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## EVIDENCE MANUAL

### 7TH EDITION



Commonwealth of Kentucky  
Department of Public Advocacy

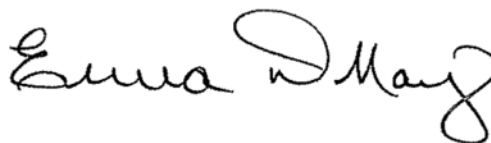
## Introducing the DPA Evidence Manual, 7<sup>th</sup> Edition

*The Advocate Evidence Manual* has provided quick answers to evidence questions for over 20 years. Louisville Metro defender J. David Niehaus served as primary author of the first five editions. The Department of Public Advocacy's Susan Jackson Balliet and Euva May took over in 2006 and are co-authors of the 6<sup>th</sup> and 7<sup>th</sup> Editions.

The Evidence Rules have not changed since the 6<sup>th</sup> Edition. However, the 7<sup>th</sup> Edition covers over six years of new case law interpreting those rules, sometimes in very new ways.\* For instance, the 2013 *Allen* case now allows cross-exam under KRE 608 regarding the underlying facts of a prior conviction. Readers will also note cases interpreting rules affecting domestic violence and child sex victims, restricting 404(b) and prior conviction evidence during penalty/sentencing, and emerging decisions on habit evidence. The 7<sup>th</sup> Edition also offers expanded discussion on non-English-speaking defendants, interpreters, and "federalizing."



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**\*WARNING:** The authors make no claim to covering all cases. This manual is intended as a quick reference and starting point. The 7<sup>th</sup> Edition covers cases through approximately February, 2013. Check Westlaw for updates.

## Table of Contents

<b>Article 1. General Provisions.....</b>	<b>1</b>	Rule 613: Prior statements of witnesses.....	67
KRE 101: Scope.....	1	Rule 614: Calling and interrogation of witnesses by court.....	69
KRE 102: Purpose and Construction.....	1	Rule 615: Exclusion of witnesses.....	70
KRE 103: Rulings on evidence.....	2	<b>Article VII. Opinion and Expert Testimony.....</b>	<b>72</b>
KRE 104: Preliminary questions.....	6	KRE 701.....	72
Rule 105: Limited admissibility.....	8	KRE 702.....	76
Rule 106: Remainder of or related writings or recorded statements.....	10	KRE 703: Bases of opinion testimony by experts.....	87
Rule 107: Miscellaneous provisions.....	11	Rule 704 (Number not utilized): "Ultimate Issue" .....	89
<b>Article II. Judicial Notice.....</b>	<b>13</b>	KRE 705: Disclosure of facts or data underlying expert opinion.....	89
Rule 201: Judicial Notice of Adjudicative Facts.....	13	KRE 706: Court-appointed experts.....	90
<b>Article III. Presumptions in Civil Actions and Proceedings.....</b>	<b>16</b>	<b>Article VIII. Hearsay.....</b>	<b>92</b>
KRE 301: Presumptions in general in civil actions and proceedings... ..	16	KRE 801: Definitions.....	92
KRE 302: Applicability of federal law or the law of other states in civil actions and proceedings.....	16	KRE 801A: Prior statements of witnesses and admissions.....	93
<b>Article IV. Relevancy and Related Subjects.....</b>	<b>17</b>	801 (a): Prior Statements.....	94
Rule 401: Definition of "relevant evidence".....	17	801 (a)(1): Prior inconsistent statements.....	95
Rule 402: General rule of relevancy.....	17	801 (a)(2): Prior consistent statements.....	95
KRE 401, 402, 403: Balancing .....	18	801(a)(3): Prior Identification.....	96
Specific applications of KRE 401, 402 and 403.....	18	801(b): Party Admissions.....	96
Rule 404: Character evidence and evidence of other crimes.....	20	KRE 802: Hearsay rule.....	97
Specific Applications of KRE 404(b).....	24	KRE 803: Hearsay exceptions: availability of declarant immaterial... ..	98
Rule 405: Methods of proving character.....	28	803(1): Present Sense Impression.....	100
Rule 406: Habit Evidence .....	30	803(2): Excited Utterance.....	100
Specific Applications of KRE 406.....	30	803(3): Then Existing Mental, Emotional, or Physical Condition.....	101
Rule 407: Subsequent remedial measures.....	31	803(4): Statements for Purposes of Medical Diagnosis or Treatment .....	101
Rule 408: Compromise and offers to compromise .....	32	803(5): Recorded Recollection.....	102
Rule 409: Payment of medical and similar expenses.....	33	803(6): Records of Regularly Conducted Activity.....	102
Rule 410: Inadmissibility of pleas, plea discussions, and related statements.....	33	803(7): Absence of Entry in Business Record.....	103
KRE 411: Liability insurance.....	34	803(8): Public Records and Reports, and (9) Records of Vital Statistics .....	103
Rule 412: Rape and similar cases - admissibility of victim's character and behavior.....	34	803(10): Absence of Entry in Public Record.....	103
<b>Article V: Privileges.....</b>	<b>38</b>	803(18): Learned Treatise.....	103
KRE 501: General rule.....	38	803 (22).....	104
KRE 502: (Number not yet utilized.).....	39	KRE 804: Hearsay exceptions: declarant unavailable.....	104
KRE 503: Lawyer-client privilege.....	39	804 (b)(1): Former Testimony.....	105
KRE 504: Husband-wife privilege.....	41	804 (b)(2): Statement Under Belief of Impending Death .....	106
KRE 505: Religious privilege.....	43	804 (b)(3): Statement Against Interest.....	106
KRE 506: Counselor-client privilege.....	43	804 (b)(4): Personal or Family History.....	107
KRE 507: Psychotherapist-patient privilege.....	45	804(b)(5): Forfeiture by Wrongdoing .....	107
KRE 508: Identity of informer.....	47	KRE 805: Hearsay within hearsay.....	107
KRE 509: Waiver of privilege by voluntary disclosure.....	48	KRE 806: Attacking and Supporting Credibility of Declarant.....	107
KRE 510: Privileged matter disclosed under compulsion or without opportunity to claim privilege.....	48	<b>Article IX. Authentication and Identification.....</b>	<b>110</b>
KRE 511: Comment upon or inference from claim of privilege; instruction.....	49	KRE 901: Requirement of Authentication or Identification.....	110
<b>Article VI. Witnesses.....</b>	<b>50</b>	KRE 903: Subscribing Witness' Testimony Unnecessary.....	115
Rule 601: Competency.....	50	<b>Article X. Contents of Writings, Recordings, and Photographs.....</b>	<b>116</b>
Rule 602: Lack of personal knowledge.....	52	KRE: 1001: Definitions.....	116
Rule 603: Oath or affirmation.....	53	KRE 1002: Requirement of Original.....	116
Rule 604: Interpreters.....	53	KRE 1003: Admissibility of Duplicates.....	117
Rule 605: Competency of judge as witness.....	55	KRE 1004: Admissibility of Other Evidence of Contents.....	117
Rule 606: Competency of juror as witness.....	55	KRE 1005: Public Records.....	118
Rule 607: Who may impeach.....	56	KRE 1006: Summaries.....	118
Rule 608: Evidence of character.....	58	KRE 1007: Testimony or Written Admission of Party.....	118
Rule 609: Impeachment by evidence of conviction of crime.....	60	KRE 1008: Functions of Court and Jury.....	119
Rule 610: Religious beliefs or opinions.....	62	<b>Article XI. Miscellaneous Rules.....</b>	<b>120</b>
Rule 611: Mode and order of interrogation and presentation.....	62	KRE 1101: Applicability of Rules.....	120
Rule 612: Writing used to refresh memory.....	66	KRE 1102: Amendments.....	121
		KRE 1103: Evidence Rules Review Commission.....	122
		KRE 1104: Use of Official Commentary.....	122

## NOTES

## Article 1. General Provisions

**KRE 101: Scope.**

These rules govern proceedings in the courts of the Commonwealth of Kentucky, to the extent and with the exceptions stated in KRE 1101. The rules should be cited as "KRE," followed by the rule number to which the citation relates.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 2

**DISCUSSION:**

All courts of justice in Kentucky follow the Rules of Evidence, but the rules do not apply in all proceedings. The rules of evidence and civil procedure apply to all disciplinary matters. *Kentucky Bar Ass'n v. Craft*, 208 S.W.3d 245, 263 (Ky. 2006) (citing SCR 3.300, SCR 3.340). The Rules of Evidence do not apply in preliminary hearings, grand jury proceedings, small claims, summary contempt, extradition, rendition, sentencing, probation, warrants, summonses, or bail proceedings. See KRE 1101. Privileges apply in all proceedings. See Article 5.

When no particular rule applies, Ky. Const. §§ 116 and 233 mandate application of the common law of evidence. Examples of issues not yet covered by Kentucky's rules include the "eavesdropper" rule (proposed KRE 502) and other evidence issues, *e.g.*, bias of a witness, that are not specifically addressed in the rules, but are resolved by application of other rules, such as KRE 401. *Stringer v. Com.*, 956 S.W. 2d 883, 891-92 (Ky. 1997).

**KRE 102: Purpose and Construction.**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 2

**DISCUSSION:**

KRE 102 calls for liberal interpretation of the rules, with the aim of saving time and money, while achieving the stated goals of fairness, truth, and justice. *Miller ex rel, etc. v. Marymount Medical Center*, 125 S. W. 3d 274, 283 (Ky. 2004) (stating that the rules of evidence "shall be construed to ... the end that the truth may be ascertained and proceedings justly determined," and holding that evidence tending to prove the objectivity of an expert witness is not inadmissible).

- a. **Ambiguous.** Since 1992 when Kentucky's evidence rules were promulgated, no rule has been successfully challenged as ambiguous.
- b. **Arbitrary.** Any evidence rule that is arbitrary would arguably violate Section 2 of the Kentucky Constitution, which prohibits arbitrariness and governs the conduct of every government agent and public officer (arguably including judges). *Kroger Company v. Kentucky Milk Marketing Comm.*, 691 S.W. 2d 893, 899 (Ky. 1985) (Commission finding that retailer was guilty of violating milk marketing law was arbitrary and capricious). Arbitrary means "[w]hatever is contrary to democratic ideals, customs and maxims... whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people....[or]...[any] action taken [that] rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship." *Id.*
- c. **Direct appeals.** See Retroactivity.(i)
- d. **Federal precedents.** Kentucky courts will consider federal precedents in construing Kentucky rules, because Kentucky's evidence rules are modeled on the federal rules. *Roberts v. Com.*, 896 S.W. 2d 4 (Ky. 1995).
- e. **Interpretation.** The "plain language" of a statute or rule is the first place Kentucky courts look in interpreting it. *See, Garrett v. Com.*, 48 S.W.3d 6, 12 (Ky. 2001).
- f. **Legislatively enacted evidence rule.** Kentucky's constitutional separation of powers mandated by Ky. Const. §§27, 28, & 116 prevents enactment of statutes that purport to declare evidence admissible. *O'Bryan v. Hedgespeth*, 892 S.W. 2d 571 (Ky. 1995).

## NOTES

- g. **Notice to the Attorney General.** KRS 418.075 requires written notice to the AG at the trial level whenever a statute or regulation is challenged as unconstitutional. *Maney v. Mary Chiles Hosp.*, 785 S.W. 2d 480 (Ky. 1990) (but *cf.*, Liebson's dissent). Notice is also required when the statute is challenged as applied. *Benet v. Com.*, 253 S.W.3d 528 (Ky. 2008). Note: KRS 418.075 does not appear to apply to challenges to evidentiary rules, which are promulgated by the Kentucky Supreme Court pursuant to Ky. Const. § 116. Regardless, there is no harm in providing written notice to the AG.
- h. **Re-trials.** In the event of a re-trial, or multiple re-trials, evidence rules in effect at the time the first direct appeal became final should govern. See Retroactivity (i).
- i. **Retroactivity (Non-retroactivity).** Amendments to the Rules of Evidence and new interpretations of evidence rules are not retroactive (except to cases still on direct appeal):
 

“KRE 107(b) refers to criminal actions “originally brought on for trial” prior to the effective date of the rules. Although KRE 107(b) deals only with the effective date of the adoption of the rules, *i.e.*, July 1, 1992, the same principles apply to the adoption of amendments to the rules. *Blair v. Com.*, 144 S.W.3d 801, 809 (Ky.2004). As pointed out in the Commentary to KRE 107(b), “cases tried ... under pre-existing evidence rules must be retried ... under the same rules if retrial ... becomes necessary.” *Terry v. Com.*, 153 S.W.3d 794, 801-02 (Ky. 2005). (citing KRE 107(b), Drafters' Commentary (1989).
- j. **New interpretations of evidence rules** that emerge while a case is still on direct appeal will apply to that case. *Hoff v. Com.*, 394 S.W.3d 368, 373 (Ky. 2011). The same rule applies to new Rules of Criminal Procedure. “[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” *Whittle v. Com.*, 352 S.W.3d 898, 905 (Ky. 2011), citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).
- k. **Trial judge authority.** Trial judges have substantial authority under KRE 102, 403, and 611 to admit or exclude evidence. KRE 102 allows broad leeway for a judge to decide whether the probative value of evidence is worth its cost in time, expense, or jury confusion. But a trial judge should not make law. KRE 102's mandate to promote "growth and development of the law of evidence" is not an invitation to trial judges to make law or change the rules of evidence. Under §116 of the Kentucky Constitution, the Kentucky Supreme Court retains exclusive authority over court rules. “Growth and development” emerges from opinions interpreting the rules and the rules-creation-and-amendment process established in KRE 1102 and 1103. *Weaver v. Alexander*, 955 S. W. 2d 722 (Ky. 1997).

**KRE 103: Rulings on evidence.**

- a. **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
- b. **Objection.** If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
- c. **Offer of proof.** If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
- d. **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
- e. **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
- f. **Motions in limine.** A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

## NOTES

- g. **Palpable error.** A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

**HISTORY:** Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 1, 34, eff. 7-1-92; 1990 c 88, § 3

**DISCUSSION:**

KRE 103 informs trial counsel how to preserve evidence objections before and during trial so that appellate courts (and trial level courts hearing new trial or RCr 11.42 motions) may grant relief. See also Federalize, (c), below.

**103(a)**

The 2007 amendment to KRE 103 makes changes to the original 1992 rules on preserving errors for review. These changes are contained in KRE 103(a). No other subsections are affected. 1) Question-and-answer testimony of witnesses is no longer required for an avowal, but is still permissible. 2) The attorney must state the specific ground of the objection. 3) A formal question-and-answer avowal is not required, though the court may still allow it.

- a. **Avowals.** See Offers of proof (d).
- b. **Continuing objections** may –or may not-- preserve error for review. *Brooks v. Com.*, 217 S.W.3d 219, 223-224 (Ky. 2007) (court considered continuing objection to testimony regarding the ledgers based on lack of foundation). But a continuing objection to bad acts evidence did not preserve an objection to hearsay contained within the bad acts evidence. *Dickerson v. Com.*, 174 S.W.3d 451 (Ky. 2005). Continuing objections are appropriate re: witness competency, marital privilege, hearsay by the same declarant, or to object to the same irrelevant evidence repeated by different witnesses. *Id.*
- c. **Federalize<sup>1</sup>** to preserve evidence issues for federal review. Your client may wish to challenge a bad state evidence ruling in the U. S. Supreme Court on certiorari review off direct appeal. In order to preserve your client's right to raise such a challenge, evidence issues must be "federalized" at trial and on appeal by citing federal authority, like *Chambers*, and *Green*:
- i If the court excludes reliable evidence, your client's federal 14<sup>th</sup> Amendment due process right to present reliable evidence may be violated. Constitutional rights trump state evidence rules that would not allow reliable defense evidence. Orally or in writing, object that the exclusion violates your client's right to federal due process. Cite *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that hearsay should not have been excluded and stating that "[w]here constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice."); see also *Green v. Georgia*, 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within ... [the state's] hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause ...."); *Rogers v. Com.*, 86 S.W.3d 29, 38-39 (Ky. 2002) (permitting reference to a failed polygraph).
  - ii If the court allows objectionable evidence, object orally or in writing that this evidence is so prejudicial it will violate your client's right to due process. Cite *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" violates due process.); *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986) (death case dealing with victim impact evidence); see also, *United States v. Scheffer*, 523 U.S. 303, 315 (1998) (approving the exclusion of polygraph evidence). You should also cite *Ege v. Yukins*, 485 F.3d 364 (6<sup>th</sup> Cir. 2007) (failure to exclude unreliable evidence violates due process --citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)). Allowing unreliable evidence to support the Commonwealth's case also reduces the Commonwealth's burden of proof. The 14<sup>th</sup> Amendment requires the Commonwealth to prove all elements beyond a reasonable doubt. *Martin v. Ohio*, 480 U.S. 228 (1987); *In re Winship*, 397 U.S. 358 (1970); Cf., *Butcher v. Com.*,

<sup>1</sup> There is close to zero chance of a successful evidence challenge in federal habeas. *Estelle v. McGuire*, 502 U.S. 62 (1991) (Supreme Court's habeas powers do not allow Court to reverse conviction based on state trial court error interpreting state evidence code); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (state evidentiary issues are matters generally left to laws of states).

## NOTES

96 S.W.3d 3, 8 (Ky. 2002) (refusing to find that a probability calculation determining paternity offended due process by lessening the Commonwealth's burden of proof). Allowing unreliable evidence also violates Kentucky Constitution §§ 2 and 11.

- d. **Offers of proof are the new rule.** Counsel must make the substance of excluded testimony “known to the court by offer.” Say “I want to make an offer of proof.” You can also say “avowal,” but technically that is no longer correct. Tell the judge what your witness would have said or what the evidence would have been. If it is physical evidence, ask to have it physically included in the record, marked as “offer of proof,” or “proffered.”
- e. **Rulings.** Get a ruling. Insist that the trial court rule on your motion, or it may be deemed waived. *Thompson v. Com.*, 147 S.W.3d 22, 40 (Ky. 2004) [Note: *Thompson* has not been “superseded by statute.” Both *Ordway v. Com.*, 391 S.W.3d 762 (Ky. 2013) and Westlaw are in error. *Jackson v. Com.*, 363 S.W. 3d 11, 19 noted that *Thompson*’s statutory references were outdated as it was decided before the adoption of the Unified Juvenile Code.].
- f. **“Specific grounds” for objections are required.** Under the old rule, counsel had to give specific grounds only when requested by the court. Now one must state specific grounds for an objection to *preserve* error for review, unless the grounds are apparent from the context. As before, reversal on appeal will require a motion to strike, a request for admonition, or a motion for mistrial, plus a court ruling. See *Bell v. Com.*, 473 S.W. 2d 820 (Ky. 1971) (specific enough “so the court will know”). See also *Gambrel v. Com.* 2008 WL 4291538, 2 (Ky. 2008) (Unreported) (KRE 103 not to be applied retroactively).

**103(b)****DISCUSSION:**

KRE 103(b) allows the judge to comment on the objection or the avowal. There is no role for the attorney unless the judge misstates the evidence or makes some other objectionable comment. KRE 103(b) preserves the option of a question-and-answer avowal.

**103(c)****DISCUSSION:**

KRE 103(c) prevents jurors from hearing evidence of contested admissibility before the judge has decided whether and under what limiting admonition the jury will be allowed to hear it. See also 104(c).

- a. **Courts’ duty.** The mandatory language --“proceeding shall be conducted”-- in KRE 103(c) places primary responsibility on the court for insulating jurors from improper information. “Side-bars,” proffers, and witness voir dres should be conducted in a way that prevents jurors from overhearing. Whether this requires a bench conference or recess of the jury is up to the court. See also KRE 611, which puts the court in charge of the “mode and order” of evidence.
- b. **The judge also has a legal duty** under KRE 611(a) and an ethical duty under SCR 4.300(3)(A)(3) and (4) to give attorneys a reasonable opportunity to make arguments on the admissibility of evidence.
- c. **Lawyers’ duty.** Lawyers have a duty to confer with the judge before presenting evidence of dubious admissibility. SCR 3. 130(3.4) prohibits alluding to any matter not reasonably relevant or believed to be supported by admissible evidence. SCR 3.5(a) prohibits any attempt to influence a juror through means prohibited by law.

**103(d)****DISCUSSION:**

Motions in limine provide for pretrial determination of admissibility. Pretrial rulings are binding throughout trial and preserve issues for appeal without the necessity of a contemporaneous objection. *In limine* motions lower the danger of jurors overhearing improper evidence, and allow more definite commitment to trial strategy before trial.

- a. **Oral motions** in limine are sufficient to preserve error, if sufficiently detailed. *Lanham*, 171 S.W.3d at 22. An oral ruling should also be sufficient. Get a written ruling if possible.
- b. **Rulings.** You must get a ruling. If the motion does not result in an “order of record,” the issue is not preserved, and you must object anew when the evidence is introduced.

## NOTES

- c. **Severance** motions (if unsuccessful) must be renewed under RCr 9. 16 when the prejudice of joint trial becomes evident. Because severance is often closely associated with questions of admissibility of evidence as to one or more co-defendants, it is advisable to renew evidence objections at the same time.
- d. **Specificity.** Be specific or your client loses. An objection made *in limine* before trial will preserve a question for review as to the matter challenged and the grounds of the objection “if such a motion is specific enough and the trial judge rules on the motion with an order on the record...” *Lanham v. Com.*, 171 S.W.3d 14, 22 (Ky. 2005) (pre-trial *limine* motion objecting to “a couple areas” of a taped statement was sufficiently detailed to preserve objection to similar references). But you might not be that lucky.
- e. **Stipulations, compromises.** In *Cook v. Com.*, 129 S. W. 3d 351 (Ky. 2004) a defendant who lost a *limine* motion later agreed to stipulate to a prior offense rather than insist on official documentation, but never formally withdrew the objection. Once you raise an objection, do not later agree to a “compromise” or “stipulation” unless you make it absolutely clear on the record that you are doing so only because the court has overruled your objection and you are not waiving your objection. The court in *Cook* held Cook had not waived his objection but had stipulated only to method of presentation of the evidence. Cook was lucky. The case could have gone the other way.
- f. **Time limits under RCr 8.20** are arguably invalid. KRE 103(d) sets no time limit on pre-trial motions in *limine* regarding evidence issues. But under the new version of RCr 8.20, as amended, effective January 1, 2013, “[t]he court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.” The new RCr 8.20, which is a general rule, arguably conflicts with the more specific KRE 103, which includes no time limits on evidence issues, and with a defendant’s right under the more specific rule in RCr 9.78 allowing a defendant to move to suppress evidence at any time before or during trial. RCr 8.20 arguably also violates KRE 1102, requiring that any change in the Evidence Rules must first be “reviewed by the Evidence Rules Revision Committee.”
- g. **Uses of limine motions.** KRE 103(d) has many uses: to obtain pretrial exclusion of evidence of prior bad acts or convictions [KRE 404(b) or 609], to test foundation [KRE 804] to question qualifications of experts [KRE 702], to examine authenticity [KRE 901], and to deal with best evidence or summary questions [KRE 1004 and 1006].

## 103(e)

## DISCUSSION:

KRE 103(e) provides that palpable error in interpreting the evidence rules clearly affecting the substantial rights of a party will be reviewed on appeal regardless of objection. See, e.g., *Alford v. Com.*, 338 S.W.3d 240 (Ky. 2011) (reversed due to palpable error in allowing detective and doctor to convey hearsay statements of victim). By contrast, palpable error is rarely found for violation of KRE 404(b). In federal court the parallel plain-error doctrine in Federal Rule of Criminal Procedure 52(b) is applied “sparingly.” *U.S. v. Young*, 470 U.S. 1, 15 (1985).

- a. **Death penalty cases**, a different, three-part analysis applies to unpreserved error. 1) Was an error committed, 2) was there a reasonable justification for failure to object (including tactical reasons) and, 3) regardless of justification, was the error so prejudicial that in its absence the defendant might not have been found guilty or sentenced to death? *Perdue v. Com.*, 916 S.W. 2d 148 (Ky. 1995).
- b. **Entire record must be reviewed.** A court must review for palpable error in light of the entire record, and must “plumb the depths of the proceeding.” *Ernst v. Com.*, 160 S.W.3d 744 (Ky. 2005), citing, *U.S. v. Young*, 470 U.S. 1, (1985).
- c. **Palpable error** is error that would have been obvious to the trial court. *Potts v. Com.*, 172 S.W.3d 345, 352 (Ky. 2005) (any potential error arising from inaudibility of police video would not have been obvious to the trial court until the playing of the video was concluded).
- d. **Prejudice** more egregious than that required for reversible error is required to show palpable error. *Ernst v. Com.*, 160 S.W.3d 744 (Ky. 2005).



- e. **“Substantial rights”** are affected when there is a “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process....” *Martin v. Com.*, 207 S.W.3d 1 (Ky. 2006) (interpreting similar “substantial rights” language in RCr 10. 26).

### **KRE 104: Preliminary questions.**

- a. **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.
- b. **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
- c. **Hearing of jury.** Hearings on the admissibility of confessions or the fruits of searches conducted under color of law shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
- d. **Testimony by accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
- e. **Weight and credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility, including evidence of bias, interest, or prejudice.

**HISTORY:** 1992 c 324, § 2, 34, eff. 7-1-92; 1990 c 88, § 4

#### **DISCUSSION:**

KRE 104 makes the judge responsible for deciding whether evidence will be admitted or excluded, and describes the rules that apply in making these preliminary determinations.

#### **104(a)**

#### **DISCUSSION:**

Subsection (a) of KRE 104 and KRE 1101(d)(1) expressly provide that --except for privileges-- the Rules of Evidence do not apply to limit what a judge may consider when making preliminary determinations. *Com. v. Priddy*, 184 S.W.3d 501, 507 (Ky. 2005) (upholding suppression based on evidence *not formally admitted*, but which parties knew judge would rely on). Note: *Crawford v. Washington*, 541 U.S. 36 (2004) also does not apply pre-trial. Neither the Confrontation Clause of the Sixth Amendment to the U.S. Constitution nor Section 11 of the Kentucky Constitution applies to pre-trial hearings. *Oakes v. Com.*, 320 S.W.3d 50, 56 (Ky. 2010).

Even so, Section 2 of the Kentucky Constitution prohibits arbitrary evidence rulings and, at minimum, requires that the evidence be reliable enough that a rational person could base a decision on it. However, the proponent of disputed evidence must produce some foundational evidence at the preliminary hearing. At least “rudimentary” authentication of documents is required, and a live witness may be necessary. *Hammond v. Com.*, 366 S.W.3d 425, 433 (Ky. 2012) (remanding for new trial).

- a. **Daubert hearings.** The determination of reliability in a *Daubert* hearing is a preliminary question of fact not binding on the jury. *Johnson v. Com.*, 12 S.W.3d 258, 262, fns. 1 and 2 (Ky. 1999) (the reliability of an entire field of so-called “science” may be attacked at trial even after the court rules it is admissible).
- b. **Fact-findings.** Requests for findings are not necessary at a preliminary hearing under CR 52.04 unless the court makes findings but then “fails to include an essential fact that would make a judgment complete.” *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011) (duty is on trial court to make findings, remedy was remand for findings despite lack of request by defendant).
- c. **Formal hearing not required.** “[A]n extensive formal hearing, at which both sides have the right to put on evidence and *question* all the witnesses, is not required.” *Swan v. Com.*, 384 S.W.3d 77, 97 (Ky. 2012).
- d. **Preponderance standard.** A judge decides admissibility of evidence or qualifications of a witness under a preponderance standard. *Parker v. Com.*, 291 S.W.3d 647, 670 (Ky. 2009). For instance, a prior acquittal doesn’t necessarily preclude evidence about the conduct that gave rise to the

## NOTES

charge. *Hampton v. Com.*, 133 S. W. 3d 438 (Ky. 2004). The prior acquittal was based on failure to find those facts beyond reasonable doubt. But under KRE 104 to rule prior bad acts admissible the judge must only find their occurrence by a preponderance. Therefore evidence of acquitted prior bad acts may be admitted on the theory that a jury could reasonably conclude they occurred. Of course, the judge must weigh such evidence under KRE 403.

- e. **Probativeness determinations.** The standard for deciding questions of probativeness, *e.g.*, whether a prior bad act actually occurred, allows admitting the evidence “if the jury could reasonably conclude that the act occurred and that the defendant was the actor.” *Davis v. Com.*, 147 S.W.3d 709, 725 (Ky. 2004). This is a low standard.
- f. **Record must contain.** Under KRE 104(a), the record must contain sufficient evidence to support a trial court’s express (or implied) fact-findings as to all foundational evidentiary requirements, *Monroe v. Com.*, 244 S.W.3d 69, 76 (Ky. 2008) (court’s findings re: foundational requirements for statement by a co-conspirator were supported by the evidence).
- g. **Suppression hearings.** In a suppression hearing consent to search is a preliminary question of fact to be decided by the judge. *Talbott v. Com.*, 968 S.W. 2d 76 (Ky. 1998). Because a suppression hearing under RCr 9.78 is a preliminary proceeding, the Rules of Evidence, except for privileges, do not apply. Hearsay testimony may be considered. *Kotila v. Com.*, 114 S.W.3d 226, 235 (Ky. 2003), *abrogated on other grounds by Matheney v. Com.*, 191 S.W.3d 599 (Ky. 2006).

**104(b)****DISCUSSION:**

KRE 104(b) works together with KRE 611(a) to allow flexibility in the presentation of evidence.

- a. **Burden is on opponent.** Under KRE 103(a)(1) the burden is on the opponent, who must move to limit or strike, or the jury may consider such evidence for any purpose.
- b. **Introduce now, fix later.** A judge may allow testimony or evidence that appears irrelevant or insufficiently authenticated in reliance on the proponent’s promise that all will become clear. *Huddleston v. U.S.*, 485 U.S. 681 (1988) (allowing proof of a bad act, theft, prior to proof the property was stolen). The Kentucky rule is identical to the federal rule. *Johnson v. Com.*, 134 S. W. 3d 563 (Ky. 2004).
- c. **Instruction to disregard, mistrial.** Failure to “connect up” the evidence later is grounds for an instruction to disregard the testimony or even a mistrial.
- d. **Object.** KRE 104(b) evidence is particularly susceptible to KRE 403 and 611(a)(2) objections for needless consumption of time, and potential to confuse or mislead. The judge may allow disjointed presentation of evidence, but is not required to defer to the convenience of parties or witnesses.

**104(c)****DISCUSSION:**

KRE 104(c) deals with whether to excuse the jury during arguments and hearings. KRE 104(c) can be used to exclude the jury for anything from a full-blown suppression hearing to a routine hearsay objection. In theory, except for the required instances, a judge can hear argument and evidence about admissibility in open court with the jurors observing. In practice, most judges require argument at the bench on any preliminary issue. *Cf. Swan v. Com.*, 384 S.W.3d 77, 96 (Ky. 2012) (finding no error in determining a child witness’s competency in front of the jury).

- a. **Expert qualifications.** KRE 104(c) allows the judge to hear the qualifications of an expert in the presence of the jury or with the jury excluded. If the witness’s expertise is not contested, there is little concern over jury contamination. But a controversial expert --e.g., a psychologist talking about a little known theory that explains an obscure point-- should not be heard by the jury until both the witness and the theory are deemed admissible.
- b. **Judge decides, except...** The decision is left to the judge except for proceedings involving confessions, or searches and seizures. RCr 9.78 also requires jury exclusion during eyewitness identification proceedings. And KRE 104(c) requires the jury to be excused for collateral proceedings in which the defendant testifies and asks for jury exclusion.
- c. **Move to exclude.** KRE 104(c) states that hearings on preliminary matters “shall” be conducted outside the jury’s presence when the “interests of justice require.” Depending on the

circumstances, a *sua sponte* order of exclusion may be required. *Kurtz v. Com.*, 172 S.W.3d 409 (Ky. 2005) (finding no such circumstances).

- d. **Pretrial motions** under RCr 9.78 and KRE 103(d) can eliminate the need to invoke this rule.

#### 104(d)

#### DISCUSSION:

KRE 104(d) permits a defendant to testify on the limited issue of admissibility of evidence without being subjected to cross-examination on other subjects.

- a. **Impeachment.** Anything the client testifies to in a preliminary hearing may be used as impeachment if the defendant testifies at trial. By limiting the subject matter of the testimony to facts bearing on admissibility, the defendant who intends to testify at trial can limit how much impeachment he wishes to face. Later use of the statements for substantive purposes is prevented by considerations of relevancy rather than by any protection in the rule.
- b. **Non-suppression preliminary hearing** testimony by a defendant, *e.g.*, at a child witness competency hearing, may be allowed under KRE 801A if defendant testifies inconsistently at trial. The importance of limiting defendant testimony at preliminary hearings is obvious. Preliminary testimony of a defendant might also be admissible under KRE 804(a)(1) and 804(b)(1) (but for the limitation on cross examination and the limited nature of the testimony, which preclude a finding that the defendant had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination).
- c. **Suppression hearing testimony.** *Harris v. New York*, 401 U.S. 222 (1971) and *Simmons v. U.S.*, 390 U.S. 377 (1968) forbid the use of a defendant's suppression hearing testimony as part of the Commonwealth's case in chief, but allow use as impeachment or rebuttal if the defendant testifies inconsistently at trial.

#### 104(e)

#### DISCUSSION:

KRE 104(e) precludes the use of preliminary rulings on the admissibility of evidence to limit attacks against the weight or credibility of evidence or witnesses. *Primm v. Isaac*, 127 S. W. 3d 630 (Ky. 2004). The reference to bias, interest or prejudice was added to insure that a party has the opportunity fully to confront the case against him. The rule works in favor of any party.

- a. **Bias, interest, or prejudice may still be shown.** KRE 104(e) only clarifies the limited effect of the judge's preliminary decision to admit or exclude under KRE 104(a) or (b). It does not prescribe the means by which bias, interest or prejudice may be shown. Some methods are prescribed in KRE 608, 609 and 613. Some are not. KRE 607 is an open rule that does not limit the ways in which impeachment can be accomplished. Common law decisions such as *Adcock v. Com.*, 702 S.W. 2d 440 (Ky. 1986) (approving questioning re: parole status of witness) have not been superseded.
- b. **Child sex victims.** A different standard applies to a child sex victim case, where the defendant bears an increased burden at the KRE 104 hearing to prove by a "substantial probability" that alleged prior false allegations by the victim were "demonstrably false." *Dennis v. Com.*, 306 S.W.3d 466, 475 (Ky. 2010) (no evidence or cross-exam on merely purported prior false allegations allowed). If the trial judge is inclined to allow the evidence or wants to hear more, a KRE 412(c)(2) hearing allows the victim to be heard before the trial judge makes the decision to allow the evidence. *Dunn v. Com.*, 360 S.W.3d 751, 766 (Ky. 2012).
- c. **Opening the door.** Any impeachment can open the door to rebuttal. The type and scope of impeachment evidence requires careful consideration.

#### Rule 105: Limited admissibility.

- a. When evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. In the absence of such a request, the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule.

## NOTES

- b. When evidence described in subdivision (a) above is excluded, such exclusion shall not be a ground for complaint on appeal, except under the palpable error rule, unless the proponent expressly offers the evidence for its proper purpose or limits the offer of proof to the party against whom the evidence is properly admissible.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 5

**DISCUSSION:**

Evidence of dubious value may be presented to the jury if the judge gives a clear instruction on the proper and limited use of the evidence. This rule provides for limiting admonitions and explains the consequences of failing to ask for admonitions.

- a. **Admonitions** must be requested. The judge is under no obligation to give admonitions *sua sponte*. *Caudill v. Com.*, 120 S. W. 3d 635 (Ky. 2003). An admonition must be requested timely, either at the time the evidence is admitted or “no later than after the direct examination at which the evidence is introduced.” *St. Clair v. Com.*, 140 S.W.3d 510, 559 (Ky. 2004). Requesting an admonition in chambers is not enough; the defendant must request it again after the evidence is actually introduced. *May v. Com.*, 2011 WL 5316761 (Ky. 2011) (reviewing issue only for palpable error) (unpublished opinion).
- b. **Admonition is presumed to cure** most problems that arise. “A jury is presumed to follow an admonition to disregard evidence and [an] admonition thus cures any error.” *Meece v. Com.*, 348 S.W.3d 627, 675 (Ky.2011).
- c. **Admonition, two exceptions when it does not cure.** The presumption that an admonition cures prejudice is rebutted: 1) when an “overwhelming probability” exists that the jury could not follow the instruction and a there is a strong likelihood that the “impermissible inference” would be “devastating” to the objecting party. And 2) where the question was not premised on fact and was “inflammatory or highly prejudicial.” *Johnson v. Com.*, 105 S. W. 3d 430 (Ky. 2003).
- d. **Appellate courts** defer to the trial judge's decisions on (a) the need to give an admonition, (b) its contents, if given, and (c) the time when it is given. *St. Clair v. Com.*, 140 S. W. 3d 510 (Ky. 2004); *Tamme v. Com.*, 973 S.W. 2d 13 (Ky. 1998); *Baze v. Com.*, 965 S.W.3d 817 (Ky. 1997).
- e. **Balancing the effect of an admonition.** The Commentary states that this rule will often be used in conjunction with KRE 403 which requires a balancing of the danger of jury misuse of evidence versus its probative value. KRE 403 analysis requires consideration of the effectiveness of a limiting admonition as part of the balancing process.
- f. **Co-defendant cases involving redaction.** In a co-defendant case involving a potential Confrontation Clause violation, the Kentucky Supreme Court has found “merit” to the contention that a limiting instruction should be given by the trial judge *sua sponte*. *Quisenberry v. Com.*, 336 S.W.3d 19, 29 (Ky. 2011). Review of a trial court’s failure to admonish in such a case will be conducted under the palpable error standard. *Id.*
- g. **Effects of admonition.** A limiting admonition has two positive effects: (a) the jury may well use the evidence for its proper purpose; and (b) the prosecutor will not be allowed to misuse the evidence in closing argument.
- h. **Evidence later found to be totally inadmissible.** An admonishment was required as to evidence presented to the jury but ultimately found by the trial court to be inadmissible. *Brown v. Com.*, 2011 WL 1327380 (Ky. App. 2011) (Unreported).
- i. **Inadequate admonishment.** If an admonishment is inadequate, the defendant must seek a further or revised admonishment. *Jones v. Overstreet*, 371 S.W.3d 727, 738 (Ky. App. 2011). If the admonishment remains inadequate, move for mistrial.
- j. **Limited purpose must be clearly stated.** The first sentence tells the judge to determine the limits of evidence in cases where it is admissible as to some but not all parties or admissible only for some limited purpose. If limited purpose evidence is excluded, the appellate courts will not review a claim of error unless the proponent has expressly stated the limited purpose for which the evidence was to be entered, apart from palpable error review under KRE 103(e).
- k. **Required if requested.** If an admonition is requested, in most cases it will be required. *Bell v. Com.*, 875 S.W. 2d 882 (Ky. 1994). Limiting admonitions are proper in KRE 404(b) cases, if

requested. *Hampton v. Com.*, 133 S. W. 3d 438 (Ky. 2004). Failure to give a requested admonition is subject to harmless error analysis. *Soto v. Com.*, 139 S. W. 3d 827, 859 (Ky. 2004).

- i. **Unobjected-to evidence, failure to request admonition.** The second sentence of KRE 105(a) codifies the common law principle that unobjected-to evidence is admissible for any purpose. In the absence of a request for admonition, the appellate courts will not consider a claim of improper use unless it rises to the level of palpable error as described in KRE 103(e).

### **Rule 106: Remainder of or related writings or recorded statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 6

#### **DISCUSSION:**

KRE 106 allows out-of-order presentation of evidence when writings or recorded statements are partially introduced. KRE 106 gives the adverse party the right to choose when the other parts of a statement or document will be dealt with. *Slaven v. Com.*, 962 S.W. 2d 845 (Ky. 1997). KRE 106 recognizes that the proper time for dealing with a document or recorded statement is when the witness is on the stand, not later on cross-examination or recall.

- a. **Any other writing or recorded statement** can be used to achieve completeness. This means that if the defendant has two other confessions that explain away the damaging impression created by the Commonwealth's evidence, they can both be introduced in the middle of the prosecutor's presentation so that the jury does not get the wrong impression. This can be done even if other witnesses must be called to authenticate these writings or statements.
- b. **Core question.** The "core question" is whether the "meaning of the included portion is altered by the excluded portion". *Com. v. Collins*, 933 S.W.2d 811 (Ky. 1996). Additional statements are admitted only to explain or put in context the statements presented by the original proponent. *Young v. Com.*, 50 S. W. 3d 148 (Ky. 2001).
- c. **Good strategy.** Because introduction of evidence under KRE 106 can be complicated and can lead to introduction of otherwise inadmissible evidence, in many cases the smart move may be to exclude a writing or recorded statement in the first place. KRE 403.
- d. **Hearsay allowed.** "Completeness" may require presentation of hearsay when "in fairness" other parts of the statement or writing should be introduced to keep the jury from being misled. Otherwise inadmissible hearsay by a non-testifying defendant may come in on cross to correct a misimpression. *Schrimsher v. Com.*, 190 S.W.3d 318, 330-331 (Ky. 2006) (police officer had testified to some of the defendant's statements during an interrogation).
- e. **How much of the remainder** of the document(s) must be admitted is within the discretion of the court. *Schrimsher v. Com.*, 190 S.W.3d 318, 330-331 (Ky. 2006). The adverse party is entitled to the remaining portions only "to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning." *Id.*
- f. **Interruption allowed.** "Completeness" may require interruption of a party's case, to allowing the opponent to present the "complete" evidence.
- g. **Oral statements may be justified** under the claim that the adverse party is misleading the jury. But admissibility under these circumstances is justified under the rule of "curative admissibility" under KRE 401-403, not "completeness" under KRE 106. Typically, merely "curative" statements would be brought up in cross examination or during the defendant's case in chief.
- h. **Writings or recorded statements**, only, are allowed under KRE 106. Its language does not permit introduction of unrecorded statements. *James v. Com.*, 360 S.W.3d 189, 205 (Ky. 2012); but see, *Rodgers v. Com.*, 285 S.W.3d 740, 748 (Ky. 2009) (also applying KRE 106 to testimony about recorded statements when the recording had not been directly admitted into evidence).

## NOTES

**Rule 107: Miscellaneous provisions.**

- a. **Parole evidence.** The provisions of the Kentucky Rules of Evidence shall not operate to repeal, modify, or affect the parole evidence rule.
- b. **Effective date.** The Kentucky Rules of Evidence shall take effect on the first day of July, 1992. They shall apply to all civil and criminal actions and proceedings originally brought on for trial upon or after that date and to pretrial motions or matters originally presented to the trial court for decision upon or after that date if a determination of such motions or matters requires an application of evidence principles; provided, however, that no evidence shall be admitted against a criminal defendant in proof of a crime committed prior to July 1, 1992, unless that evidence would have been admissible under evidence principles in existence prior to the adoption of these rules.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 7

- a. **Amendments to the evidence rules, effective date.** When a rule is amended, KRE 107(b) applies. For instance, the original version of KRE 608 applies to a retrial if it applied at the original trial. *Terry*, 153 S.W.3d at 801-802; *Blair v. Com.*, 144 S. W. 3d 801 (Ky. 2004). See also KRE 701. In cases tried prior to May 1, 2007, when subsection (c) was added to KRE 701, lay opinion touching on scientific topics is allowed under the old rule. *Richards v. Com.*, 2007 WL 4462348, Fn. 3 (Ky.2007) (Unreported) (allowing lay footprint evidence, but suggesting it would *not* qualify under section (c) of the amended rule).
- b. **Appeals.** The appellate standard of review for almost every kind of evidence issue is abuse of discretion. *Cook v. Com.*, 129 S.W.3d 351 (Ky. 2004). A constitutional violation, like the denial of the constitutional right of confrontation, must be proved harmless beyond reasonable doubt. *Quarels v. Com.*, 142 S. W. 3d 73 (Ky. 2004). But a non-constitutional evidentiary error is subject to standard harmless error (plain error) review, and then to the abuse of discretion standard. *Winstead v. Com.*, 283 S.W.3d 678, 688-689 (Ky. 2009) (evidentiary error may be deemed harmless if the judgment was not substantially swayed by the error) The inquiry is not whether there was enough evidence to support the result apart from the error. The question is whether the error had substantial influence and whether one is left in grave doubt. *Id.*
- c. **Daubert rulings** under KRE 702 are treated to a more complicated appellate standard. First the court's findings as to the reliability of the expert evidence is evaluated for clear error. Then the decision whether or not to admit that evidence is evaluated under the abuse of discretion standard. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004).
- d. **Effective date provisions** in KRE 107(b) affect retrials. Any trial or proceeding that began on or after July 1, 1992, must follow the rules of evidence effective on that date. For offenses tried before July 1, 1992, the prior common law of evidence applies. *St. Clair v. Com.*, 140 S. W. 3d 510 (Ky. 2004). Any appeal of a case originally tried under the previous common law evidence rules will be decided on that basis. Any retrials of cases originally prosecuted or begun before July 1, 1992 must be considered under the previous evidence law. *Terry v. Com.*, 153 S.W.3d 794, 802 (Ky. 2005). See New decisions (e), and Retrials (g).
- e. **New decisions** regarding evidence rules may be applied on appeal. New interpretations of evidence rules that were not in effect at the time of trial may be applied on direct appeal. *Hoff v. Com.*, 394 S.W.3d 368, 373 (Ky. 2011).
- f. **Parole evidence** may come in play in interpreting plea agreements, and where written or oral contracts appear in fraud or theft cases. The parole evidence rule prevents the introduction of oral statements to alter a written agreement, but does not apply when there is an allegation of fraud in the inducement. *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256 (Ky.App. 2007).
- g. **Retrials.** *Date of the crime, and date of the original trial affect re-trial.* KRE 107 refers to criminal actions "originally brought on for trial" prior to the effective date of the rules with the proviso that "no evidence shall be admitted against a criminal defendant in proof of a crime committed prior to July 1, 1992, unless that evidence would have been admissible under evidence principles in existence prior to the adoption of these rules." ...[T]he same principles should apply to the adoption of amendments to the rules. However, as pointed out in the Commentary to KRE 107, "cases tried ... under pre-existing evidence rules must be retried ... under the same rules if retrial ... becomes necessary." *Blair v. Com.*, 144 S.W.3d 801, 809 (Ky. 2004); see also *Terry*, 153 S.W.3d 794, 801-802 (Ky. 2005); *St. Clair v. Com.*, 140 S.W.3d 510, 536 (Ky. 2004) (crime committed prior

to the July 1, 1992 effective date of the Kentucky Rules of Evidence); *See also Hodge v. Com.*, 17 S.W.3d 824, 842 (Ky. 2000). In the event of a re-trial, evidence rules in effect at the time the direct appeal became final arguably govern. See New decisions (e) and Effective date provisions (d).

## NOTES

## NOTES

## Article II. Judicial Notice

**Rule 201: Judicial Notice of Adjudicative Facts.**

- a. **Scope of rule.** This rule governs only judicial notice of adjudicative facts.
- b. **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
  - 1. Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
  - 2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- c. **When discretionary.** A court may take judicial notice, whether requested or not.
- d. **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
- e. **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- f. **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.
- g. **Instructing the jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 8

**DISCUSSION:**

Some facts are so obviously true that it wastes time to prove or dispute them. Therefore KRE 201 allows any court, including an appellate court, to take judicial notice of such facts at any stage in the proceedings, including at trial, on appeal and in post conviction.

- a. **Laws and regulations are not proper subjects for judicial notice.** Taking judicial notice of “the law” during the course of a trial is like instructing the jury prior to the close of the evidence. *Clay v. Com.*, 291 S.W.3d 210, 217 (Ky. 2008) (court erred by judicially noticing that defense had legal right to access expert raw data); *Burton v. Foster Wheeler Corp.*, 72 S. W.3d 925 (Ky. 2002).
- b. **But if the terms of a regulation, statute, or superseded statute are disputed,** the existence of regulations, and their subject matter, are required to be judicially noticed under KRS 13A.090(2). Current statutes are judicially noticed under KRS 7. 138(3). Superseded statutes and codes are judicially noticed under KRS 447.030. Check the statute for requirements as to certification.
- c. **Definitions of words** contained in dictionaries, including medical dictionaries, are judicially noticeable. Once judicially noticed a definition is indisputable. *Stokes v. Com.*, 275 S.W.3d 185, 188 (Ky. 2008). See also KRE 803(18), learned treatise exception to hearsay.
- d. **“Adjudicative facts”** are facts that must be proved formally, *i.e.*, facts that support or attack the elements of the case, facts bearing on who performed the acts or their culpable mental state. Commentary to KRE 201. According to Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 1.00[2][c] (4th ed.2003) an adjudicative fact is “a fact to which the law is applied in the adjudicative process that would normally go to a jury and relates to the parties, their activities, their properties, or their businesses.”
- e. **Adjudicative facts must be indisputable** in order to be judicially noticeable and must meet one of the two tests set forth in KRE 201(b)(1)-(2). *Beavers v. Beavers*, 2009 WL 102958 (Ky. App. 2009) (Unreported) (remanding for determination whether purported “adjudicative” facts relied on from prior case were indisputable under KRE 201(b) (1) or (2)).
- f. **A judge's personal knowledge** is not an “adjudicative fact” and is not a proper basis for judicial notice. *Com. v. Howlett*, 328 S.W.3d 191 (Ky. 2010) (court erred dismissing DUI by taking judicial notice that a burp during the observation time prior to a breath test re-started the observation time).
- g. **A court is not required** to follow the evidence rules in taking judicial notice. KRE 101(a).



## NOTES

- h. **Timing.** Fairness suggests that a request for judicial notice should be made before trial, but this is not a requirement and “judicial notice may be taken at any stage of the proceeding.” KRE 201(f). But see (j) below, discussing recent reluctance by Kentucky Supreme Court to take judicial notice on appeal.
- i. **Right to a hearing, preservation for appeal.** A defendant has a right to a hearing under KRE 201(e) on any question regarding judicial notice, and the failure to object and request a hearing even after judicial notice has been taken may render a judicial notice issue unpreserved for appeal. *Clay v. Com.*, 291 S.W.3d 210, 220 (Ky. 2008). But *cf.*, *Com. v. Howlett*, 328 S.W.3d 191, 194 (Ky. 2010) where court took judicial notice *sua sponte* and dismissed case in the same motion, Kentucky Supreme Court held there was no opportunity to make a “timely request” for “an opportunity to be heard” on judicial notice and reversed.
- j. **The Kentucky Supreme Court** appears increasingly reluctant to take judicial notice on appeal. *Mash v. Com.*, 376 S.W.3d 548, 552 (Ky. 2012) (refusing to take judicial notice of census data on appeal when trial court had not been provided with the information); see also *Com., Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324, 335 (Ky. 2011) (refusing to judicially notice ledger facts because they occurred *after* the relevant contempt hearing).
- k. **A court may notice court records** from other cases as evidence of the occurrence and timing of matters reflected in them, including the holding of a hearing, or the filing of a pleading. *Rogers v. Com.*, 366 S.W.3d 446, 451-52 (Ky. 2012). In dicta, the Court in *Rogers* also states that “a court will generally not notice the truth of allegations or findings made in another matter.” *Id.*, citing, *Meece v. Com.*, 348 S.W.3d 627, 692–93 (Ky. 2011). *Meece* involved a refusal to judicially notice a disputed recitation of fact contained in a prior opinion, and did not involve refusal to notice findings. This dicta in *Rogers* arguably overlooks *Fugate* and *Johnson*, discussed at (p) below.
- l. **Findings of fact** were judicially noticed in *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010) “A finding of fact contained in an order of a circuit court is typically not subject to reasonable dispute...[h]owever, its consideration of the evidence it heard in the earlier action was improper.” *Id.* (emphasis added); *cf.*, *Collins v. Combs*, 320 S.W.3d 669, 678 (Ky. 2010) (approving Court of Appeals’ taking judicial notice, apparently of facts in prior Court of Appeals’ opinions regarding the same party, as well as of a federal opinion and a recusal order on the ground these were “public records”).
- m. **Court opinions that are not yet final.** *Collins, above*, cites *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky.App. 2005) for the proposition that judicial notice may be taken of court opinions that are not yet final. *Id.*, at 678.
- n. **Kentucky appellate courts** have taken judicial notice of: teenage drinking, *Com. v. Howard*, 969 S.W. 2d 700 (Ky. 1998), the purpose of seatbelts, *Laughlin v. Lamkin*, 979 S.W. 2d 121 (Ky.App. 1998), facts in a bill of particulars, *Jackson v. Com.*, 3 S.W.3d 718 (Ky. 1999), the layout/ equipment of a judicial center, *Com. v. M. G.*, 75 S. W. 3d 714 (Ky App. 2002), prior felony records from the same court, *Hutson v. Com.*, 215 S.W.3d 708, (Ky.App. 2006); that a certain photo ID identified defendant, *Lambert v. Com.*, 2004 WL 813363, (Ky.App. 2004) (Unreported); probation conditions contained in a judgment, *Dipietro v. Com.*, 2006 WL 335987 (Ky.App. 2006) (Unreported).
- o. Internet materials:
  1. **YES, judicial notice appropriate for:** the online CPI (Bureau of Labor Statistics' Consumer Price Index), *Daunhauer v. Daunhauer*, 295 S.W.3d 154, 159 (Ky. App. 2009); yes to the website of the National Library of Medicine and the National Institutes of Health, [www.pubmed.gov](http://www.pubmed.gov), *Louisville-Jefferson County Metro Government v. Martin*, 2009 WL 1636270 (Ky. App. 2009) (Unreported); Mapquest.com, *Rippetoe v. Feese*, 217 S.W.3d 887 (Ky.App. 2007) (notice taken on appeal); and PACER federal docket info, *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, (Ky.App. 2005)
  2. **NO to:** Statistics from a government website when no web address is provided. *Polley v. Allen*, 132 S. W. 3d 223 (Ky. App. 2004); material from a commercial website, *Dowell v. Safe Auto Ins. Co.* 208 S.W.3d 872 (Ky. 2006); material from a possibly opinionated website, *e.g.*, Consumer Electronic Association, *Powers v. Halpin*, 2007 WL 1196527, (Ky.App. 2007) (Unreported)

## NOTES

- p. **Scientific info.** The Kentucky Supreme has judicially noticed on appeal the reliability of expert/scientific opinion based on prior approval in pre-*Daubert* cases --including alcohol breath testing, HLA blood typing, fiber, ballistics, fingerprint, and micro hair analysis, *Johnson v. Com.*, 12 S.W.3d 258 (Ky. 1999) and DNA test results, *Fugate v. Com.*, 993 S.W.2d 931 (Ky. 1999). Also judicially noticed on appeal: info from The Merck Index, Thirteenth Edition, (2001), and Uncle Fester, *Secrets of Methamphetamine Manufacture*, (6th Ed. 2002), *Matheny v. Com.*, 191 S.W. 3d 599, 609 (Ky. 2006) (Graves concurrence, *cf.* Cooper dissent criticizing notice of Uncle Fester); judicial notice of reliability of tests identifying methamphetamine, *Fulkerson v. Com.*, 2005 WL 2323142 (Ky.App. 2005) (Unreported).
- q. **Judges must take notice upon request** of a party who presents sufficient information to support taking judicial notice. KRE 201(d). The rule is mandatory. "Necessary information" generally refers to certified copies of documentation.
- r. **Judges may take notice *sua sponte*.** KRE 611 (a) instructs judges to regulate the evidence to ascertain truth and avoid wasting time. Judicial notice certainly achieves these purposes. However, the judge must avoid the appearance of supporting one side over the other. KRE 605; 614 (a) & (b).
- s. **Judicially noticed fact are conclusively established.** KRE 201(g). But in criminal cases every element must be proved beyond a reasonable doubt. KRS 500.070. Only the jury can make such a finding. Ky. Const., §§ 7 and 11. On the surface, 201(g) conflicts with the Ky. Constitution, yet has not been challenged.
- t. **The jury must be instructed that noticed facts are conclusive.** KRE 201(g). Therefore adverse parties are not allowed to introduce contradictory evidence. If expert opinion has been judicially noticed, a challenging party is entitled to be heard, and must be given a chance to introduce contrary evidence. *Johnson v. Com.*, 12 S. W. 3d 258 (Ky. 1999).
- u. **Timing.** A court can take judicial notice at any time. KRE 201(f). *Johnson v. Com.*, 12 S.W.3d 258, 261-62 (Ky. 1999) (on appeal judicially noticing numerous areas of so-called science); *Fugate v. Com.*, 993 S.W. 2d 931 (Ky. 1999) (appellate judicial notice of reliability of DNA testing); *Rippetoe v. Feese*, 217 S.W.3d 887 (Ky.App. 2007) (noticing Mapquest.com on appeal). The Commentary suggests appellate courts should be reluctant to take judicial notice if no request was made at the trial level. The rule itself and Kentucky case law say otherwise. But *cf.*, (j) above for emerging reluctance by Kentucky Supreme Court to take judicial notice on appeal.
- v. **Documents not of record** may be judicially noticed, in an emergency: *McNeeley v. McNeeley*, 45 S. W. 3d 876 (Ky. App. 2001) (re: denial of a visitation hearing, judgment of conviction for murder of a small child was judicially noticed on appeal).

**Article III. Presumptions in Civil Actions and Proceedings****NOTES****KRE 301: Presumptions in general in civil actions and proceedings**

In all civil actions and proceedings when not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 9

**KRE 302: Applicability of federal law or the law of other states in civil actions and proceedings**

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which the federal law or the law of another state supplies the rule of decision is determined in accordance with federal law or the law of the other state.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 10

**DISCUSSION:**

The due process clause of the 14th amendment prohibits shifting any portion of the burden of proof from the prosecution to the defense. *Mullaney v. Wilbur*, 421 U. S. 684 (1973). KRS 500.070(1) & (3) assign the burden of proof (of persuasion) to the Commonwealth on every element of the case except for certain mistake defenses and insanity. *Grimes v. McAnulty*, 957 S.W.2d 223 (Ky. 1997). Rules 301 and 302 deal only with civil actions and therefore do not affect criminal practice.

## NOTES

## Article IV. Relevancy and Related Subjects

**Rule 401: Definition of "relevant evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**HISTORY:** 1992 C 324, § 34, EFF. 7-1-92; 1990 C 8, § 11

**Rule 402: General rule of relevancy**

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible.

**HISTORY:** 1992 C 324, § 34, EFF. 7-1-92; 1990 C 8, § 12

Rule 403: Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

**HISTORY:** 1992 C 324, § 34, EFF. 7-1-92; 1990 C 8, § 13

**DISCUSSION:**

Relevancy is always the first question to ask about any item of evidence. KRE 401, 402, and 403 generally operate together, and – together with KRE 601 and 602 (witness competency)—they form the fundamental principles of admissibility. If evidence is not relevant under KRE 401, it is not admissible under KRE 402. No further objection is necessary.

But under KRE 401, 402, and 403 judges are encouraged to resolve doubts in favor of admission. Relevant evidence may only be excluded if its prejudicial effect outweighs its probative value.

- a. **Prejudice defined.** Evidence is unfairly prejudicial if it “appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.” *Butler v. Com.*, 367 S.W.3d 609, 615 (Ky.App. 2012), quoting *Thorpe v. Com.*, 295 S.W.3d 458, 462 (Ky.App. 2009). Rule 403 offers no protection against evidence that is “merely prejudicial in the sense that it is detrimental to a party's case.” *Webb v. Com.*, 387 S.W.3d 319, 326 (Ky. 2012) (allowing evidence that victim jail guards knew defendant from his prior stay *in prison*). Prejudice is harm that is “unnecessary and unreasonable.” *Romans v. Com.*, 547 S.W.2d 128 (Ky. 1977).
- b. **Harmless error applies.** Admission of prejudicial evidence may be harmless. *Welch v. Com.*, 235 S.W.3d 555 (Ky. 2007) (marginally relevant bad acts evidence of defendant's statement this was his “last lick” interpreted to mean he'd committed prior robberies).
- c. **Federalize** by adding federal authority to your trial objections, or your client may forfeit federal review, and you may be deemed ineffective. *Picard v. Connor*, 404 U.S. 270 (1971) (state prisoner who seeks federal habeas review must present to state court the same claim he urges upon the federal courts in order to exhaust state remedies). A federal habeas petitioner cannot claim an evidentiary ruling denied him due process unless he first says so in state court. *Franklin v. Bradshaw*, 695 F.3d 439, 456 (6th Cir. 2012) (holding federal due process claims were defaulted). You don't want to be featured in a case like *Edwards v. Carpenter*, 529 U.S. 446 (2000) (the claim --that an ineffective-assistance-of-state-trial-counsel claim should be heard in federal court despite default by ineffective appellate counsel-- could itself be defaulted by ineffective post-conviction counsel).
- d. **The Supreme Court** has explained that neither a bare reference to “full faith and credit” nor “passing invocations of ‘due process’” without citation to the federal constitution or cases relying on the 14<sup>th</sup> Amendment will suffice to preserve a claim for federal review. *Howell v. Mississippi*, 543 U.S. 440, 443-44, fn. 2 (2005) (dismissing case because petitioner did not cite the federal constitution or any case construing it “much less any of this Court's cases”). See also, *Coleman*

## NOTES

*v. Mitchell*, 244 F.3d 533, 542 (6<sup>th</sup> Cir. 2001). A state court evidentiary ruling will be reviewed by a federal court only if you cite federal authority, preferably United States Supreme Court precedent. *Howell*, *supra*.

- e. **If the court excludes your evidence.** Orally or in writing, object that the exclusion violates your client's right to federal due process and cite *Chambers v. Mississippi*, 410 U.S. 284 (1973) (failure to allow reliable defense evidence violates 5<sup>th</sup> and 14<sup>th</sup> Amendment due process). Exclusion of reliable evidence violates due process when it "significantly undermine[s] fundamental elements of the defendant's defense." The exclusion of defense evidence undermines the central truth-seeking aim of the criminal justice system by distorting the record at the risk of misleading the jury into convicting an innocent person.
- f. **If the court threatens to allow objectionable evidence.** Orally or in writing, object that this evidence is so prejudicial it will violate your client's right to due process, and cite *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" violates due process.); *see also*, *United States v. Scheffer*, 523 U.S. 303, 315 (1998) (approving the exclusion of polygraph evidence). You should also cite *Ege v. Yukins*, 485 F.3d 364 (6<sup>th</sup> Cir. 2007) (failure to exclude *unreliable* evidence violates due process, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

### **KRE 401, 402, 403: Balancing**

The KRE 403 balancing test applies to all relevant evidence. Failure to perform balancing may be an abuse of discretion in and of itself. *Ferry v. Com.*, 234 S.W.3d 358, 361-362 (Ky.App. 2007).

#### **Step One: Assess probative value**

Evidence is relevant if it has any tendency to make a fact "of consequence" more (or less) probable. Evidence that tends to prove or disprove an element of an offense or defense is relevant. *Harris v. Com.*, 134 S. W. 3d 603 (Ky. 2004). If the evidence is a "link in the chain" of proof, it is relevant. *Parson v. Com.*, 144 S. W. 3d 775 (Ky. 2004). Evidence that is even slightly probative satisfies KRE 401. *Blair v. Com.*, 144 S. W. 3d 801 (Ky. 2004); *see also Webb v. Com.*, 387 S.W.3d 319 (Ky. 2012) (the place *where* the victims --prison guards-- knew the defendant --prison- was deemed relevant to their ability to identify him). If evidence is not relevant, it will be excluded in Step Two on that ground alone. *See Major v. Com.*, 177 S.W.3d 700 (Ky. 2005) (guns *known* to be unrelated to the crime were not relevant and therefore not admissible)

#### **Step Two: Assess harmful effects**

Irrelevant evidence is automatically excluded. Relevant evidence may also be subject to exclusion by statutes, court rules, or federal / state constitutional requirements. See RCr 7.24 (9) (discovery sanctions), KRE 403 (undue prejudice), or the 4<sup>th</sup> Amendment (fruits of illegal search and seizure). The fact that evidence was obtained in violation of a statute, standing alone, is not a ground for exclusion. *Cook v. Com.*, 129 S. W. 3d 351 (Ky. 2004).

#### **Step Three: Perform KRE 403 balancing**

Relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

### **Specific applications of KRE 401, 402 and 403**

- a. **Alternate perpetrator** The identity of the perpetrator is an essential element of every case. *St. Clair v. Com.*, 140 S. W. 3d 510 (Ky. 2004). Kentucky recognizes the alternative perpetrator defense. *Blair v. Com.*, 144 S. W. 3d 801 (Ky. 2004); *Beaty v. Com.*, 125 S. W. 3d 196 (Ky. 2003). Any evidence tending to show the defendant was not the perpetrator is relevant and admissible, subject to KRE 403 balancing. *Beaty* and *Blair* require a showing of some likelihood that another person could have done this. "Aaltperp" (*i.e.*, alleged alternative perpetrator) evidence must include evidence of both motive and opportunity in order to pass the balancing test under KRE 403 for admissibility. *Smith v. Com.*, 2012 WL 4222211 (Ky. 2012) (FINAL)
- b. **Bias, motive to testify.** Evidence tending to show witness bias or interest in the outcome is always relevant and admissible. *Primm v. Isaac*, 127 S. W. 3d 630 (Ky. 2004).

## NOTES

- c. **Co-defendant guilty plea.** It is improper to introduce evidence of a co-defendant's or co-indictee's guilty plea during the prosecutor's case in chief. *St. Clair v. Com.*, 140 S. W. 3d 510 (Ky. 2004); *Parido v. Com.*, 547 S.W. 2d 125 (Ky.1977) (finding this a "substantial rights" violation); *see also*, *Dant v. Com.*, 258 S.W.3d 12, 24 (Ky. 2008); and *Tipton v. Com.*, 640 S.W. 2d 818 (Ky. 1982).
- d. **Collateral matters, cross-examination, scope** A trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue raised by a party on direct examination. *Com. v. Prater*, 324 S.W.3d 393 (Ky. 2010). Cross-examination on collateral matters is subject to exclusion based on KRE 403 balancing. *Davenport v. Com.*, 177 S.W.3d 763, 772 (Ky. 2005). See under KRE 405, Collateral facts (b).
- e. **Crack whore.** The probative effect of evidence that the victim was a "crack whore" with a history of heavy drug use was excludable on relevancy grounds alone. *Moorman v. Com.*, 325 S.W.3d 325, 333 (Ky. 2010) (upholding trial court exclusion of evidence based on KRE 401, 402 and 403).
- f. **Daubert, Kumho Tire opinion.** Qualifying under *Daubert* as scientifically reliable does not render evidence automatically admissible. Scientific evidence must also pass KRE 401 relevance and KRE 403 balancing tests. *McIntire v. Com.*, 192 S.W.3d 690 (Ky. 2006) (allowing Dr.'s opinion that non-abusing parent would know his child was being abused was harmful error); *cf.*, *Ragland v. Com.*, 191 S.W.3d 569 (Ky. 2006) (tests showing bullets could not have been fired from three similar guns was relevant, not too prejudicial). See also *Meadows v. Com.*, 178 S.W.3d 527 (Ky.App. 2005) (expert opinion on bite marks not unduly prejudicial); *cf.*, *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (bite mark evidence is so unreliable that allowing it violates due process).
- g. **Details of prior crimes at sentencing.** See *Mullikan v. Com.*, 341 S.W.3d 99 (Ky. 2011). This is a KRE 801, hearsay issue. Only basic elements of offense are allowed.
- h. **Doubtful, equivocal.** Judges should not allow doubtful evidence "for whatever it's worth." Judges have a duty to determine the worth of any evidence that might be admitted, as well as its potential for misuse by the jury. KRE 103 (c). KRE 403 requires careful balancing, and KRE 611 (a) requires judges to manage presentation of evidence for ascertainment of the truth. Equivocal testimony regarding a party's marijuana use was excluded under KRE 403 in *Bloxam v. Berg*, 230 S.W.3d 592, 595 (Ky.App. 2007).
- i. **Flight** after a crime is deemed "some proof of guilt." *Rodriguez v. Com.*, 107 S. W. 3d 215 (Ky. 2003). The government should be required to show a link between the crime and the flight. But *cf.*, *Com. v. Bowles*, 237 S.W.3d 137 (Ky. 2007) (flight from police after a separate, unrelated hit-and-run deemed admissible because defendant *may* have been thinking about earlier crime); *Ordway v. Com.*, 391 S.W.3d 762 (Ky. 2013) (efforts to hale a car in immediate aftermath of shooting was admissible as effort to avoid arrest and was inextricably intertwined).
- j. **Guns, weapons.** See *Major v. Com.*, 177 S.W.3d 700 (Ky. 2005) (guns *known* to be unrelated to the crime are not relevant and are therefore inadmissible); *cf.*, *Harris v. Com.*, 384 S.W.3d 117, 123 (Ky. 2012) (evidence of weapons may be admitted where there is a "possible connection" to the crime) and *Coulthard v. Com.*, 230 S.W.3d 572, 580 (Ky. 2007) (extensive gun evidence was relevant to show knowledge/skill with firearms, and refute claim that a shooting was unintended).
- k. **Photos and videos:**
  - 1. Photos are admissible unless their gruesome nature goes "far beyond demonstrating proof of a relevant contested fact." *Ratliff v. Com.*, 194 S.W.3d 258, 271 (Ky. 2006). The court should consider whether evidentiary alternatives would sufficiently prove the fact without comparable risk of prejudice. *Ratliff*, 194 S.W. 3d at 271.
  - 2. Only when photographs begin to depict a body that has been "materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer," only then are they inadmissible under KRE 403 balancing. *Hunt v. Com.*, 304 S.W.3d 15, 41 (Ky. 2009), *quoting*, *Clark v. Com.*, 833 S.W.2d 793, 794 (Ky.1991).
- l. **Ask to limit the number and content** of photos admitted as exhibits, and –separately– those shown to the jury. KRE 611(a); KRE 403. Videos are not intrinsically more prejudicial than photos. *Wheeler v. Com.*, 121 S. W. 3d 173 (Ky. 2003).

## NOTES

- m. **Pregnancy of victim.** *Cook v. Com.*, 129 S.W.3d 351, 361-362 (Ky. 2004) (informing jury that victim was pregnant was not unduly prejudicial).
- n. **Pornography possession.** See Sex toys.
- o. **Prior testimony.** Trial court erred by failing to subject Brown's first-trial testimony to "the rigors of the relevance rules." *Brown v. Com.*, 313 S.W.3d 577, 606 (Ky. 2010). See *Aliotta v. National Railroad Passenger Corp.*, 315 F.3d 756, 763 (7th Cir.2003) (Rule 403 "clearly applies" to party-opponent admissions.); *Williams v. Drake*, 146 F.3d 44, 48 (1st Cir.1998) ("Even an admission by a party-opponent is subject to exclusion under Rule 403."); *LaSota v. Corcoran*, 583 P.2d 229, 238 (Ariz. 1978) ("['F]ormer testimony' must also meet the tests of relevancy and absence of overriding prejudice.").
- p. **Privilege violation.** When a privilege has been violated, balancing under KRE 403 is not necessary, and reversal is appropriate on a simple finding of prejudice. *St. Clair v. Com.*, 174 S.W.3d 474 (Ky. 2005) (as noted in the dissent).
- q. **Rape victims.** A rape victim's reluctance to appear voluntarily as a witness is not relevant to suggest a lack of veracity. *Slone v. Com.*, 382 S.W.3d 851, 857 (Ky. 2012). Rape victim's fear of a sexually transmitted disease was relevant to the issue of consent. *Id.*, at 858.
- r. **Sex toys, strip clubs.** Evidence of possession of pornography and sex toys, going to strip clubs, and marijuana use did not establish sexual intent toward the children. *Jenkins v. Com.*, 275 S.W.3d 226, 229 (Ky. App. 2008)
- s. **Stipulations.** The government is allowed to present a complete, unfragmented picture of the crime and investigation. *Adkins v. Com.*, 96 S. W. 3d 779 (Ky. 2003). A defendant cannot stipulate away parts of the Commonwealth's case. *Pollini v. Com.*, 172 S.W.3d 418, 424 (Ky. 2005), citing, *Johnson v. Com.*, 105 S.W.3d 430, 438-39 (Ky. 2003). But see *Old Chief v. U.S.*, 519 U.S. 172 (1997) (abuse of discretion to refuse stipulation to status element and instead admit evidence of a prior conviction). *Old Chief* was adopted by *Anderson v. Com.*, 281 S.W.3d 761, 762 (Ky. 2009).
- t. **Stress in defendant's life.** Evidence concerning defendant's stressful personal and family life was admissible during the Commonwealth's case-in-chief because it tended to prove that his motive for shooting a co-worker was jealousy of the co-worker's finances and lifestyle. *McGuire v. Com.*, 368 S.W.3d 100, 110 (Ky. 2012) (affirming first-degree manslaughter conviction).
- u. **Urinalysis.** Prejudice from evidence of a urinalysis positive for marijuana and cocaine outweighed its value in vehicular homicide case, because marijuana can appear in urine up to seven days after ingestion and cocaine up to four days. *Burton v. Com.*, 300 S.W.3d 126, 131-32 (Ky. 2009) (reversing and remanding in part).
- v. **Victim humanization evidence** is relevant in homicide cases and not just in the penalty phase. "Careful" 403 balancing should apply. *Hilbert v. Com.*, 162 S.W.3d 921 (Ky. 2005) (approving a "brief display" of victim portraits and "reserved testimony" by two mothers lasting a little over three minutes); *beware, Edmonds v. Com.*, 2009 WL 4263142 (Ky. 2009) (Unreported) (harmless error to allow a total stranger to introduce voluminous prejudicial "humanizing" evidence).
- w. **Wantonness.** The relevance of defendant's positive urinalysis results for marijuana and cocaine to prove wantonness was substantially outweighed by danger of undue prejudice. *Burton v. Com.*, 300 S.W.3d 126 (Ky. 2009); *Berryman v. Com.*, 237 S.W.3d 175 (Ky. 2007) (in vehicular homicide, evidence that driver was distracted by counting illicit Lortabs while driving was admissible, relevant to wantonness).
- x. **Weapons**, see Guns.

**Rule 404: Character evidence and evidence of other crimes**

- a. **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
  - 1. **Character of accused.** Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under

## NOTES

Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

2. **Character of victim generally.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

3. **Character of witnesses.** Evidence of the character of witnesses is covered in KRE 607, KRE 608, and KRE 609.

b. **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

1. If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

2. If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

c. **Notice requirement.** In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

**HISTORY:** Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 4, 34, eff. 7-1-92; 1990 c 88, § 14

**DISCUSSION:**

a. **The 2007 amendment changed subsection (a)(1)** to allow the prosecution to prove a defendant's character not only in rebuttal of character evidence offered by the defendant, but also after the defense attacks the character of the victim. See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment. Otherwise, generally, Rule 404 prohibits character evidence offered to prove a person acted in keeping with that character. Character evidence is less probative and less reliable than habit evidence because it describes a tendency rather than an invariable response. Character indicates that action in conformity is likely, but affords no reasonable basis for determining how likely. There are strict limitations on its use.

b. Prior bad acts (not prior convictions). KRE 404(b) evidence may be offered as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident or may be inextricably intertwined with other evidence. In a criminal case 404(b) evidence is admissible only when the prosecution gives the defendant pretrial notice under KRE 404(c).<sup>1</sup> Admission of prior bad acts is also subject to KRE 403 balancing. Prejudice from prior bad act evidence often outweighs its probative value, as will be seen in the examples discussed below.

**Rule 404(a)****DISCUSSION:**

By its plain language, KRE 404 strictly forbids evidence to prove an act in conformance with character. Rule 404 applies only to the accused and the victim, and only when their character is relevant.<sup>2</sup> The accused may always introduce evidence of her own relevant character or trait of character to convince the jury she is not the type of person who would do the acts charged, or act with the culpable mental state alleged. *Johnson v. Com.*, 885 S.W. 2d 951, 953 (Ky. 1994).

a. **Prosecutor may attack defendant's character only to rebut --or if defendant attacks the victim's character.** A defendant should think carefully before touting his own character or attacking the

<sup>1</sup> By contrast, KRE 608(b) allows cross-exam into specific acts of a witness that have not resulted in a criminal conviction if those acts are probative of truthfulness or untruthfulness. *Allen v. Com.*, 2013 WL 1181802 (Ky. 2013) (NOT FINAL). No 404(c) notice is required. Any inquiry into a prior felony conviction of a party or witness is strictly governed by KRE 609.

<sup>2</sup> The character of a witness other than the accused or the victim may be attacked by the methods described in KRE 607, 608 and 609.



## NOTES

character of the victim. If the defendant puts his character in issue by testifying (or otherwise), the prosecutor may rebut with contrary evidence of the defendant's character. *Cf.*, *Anderson v. Com.*, 231 S.W.3d 117 (Ky. 2007) (where defendant did not testify, witness testimony that defendant said he “just got out of prison for the same thing” was inadmissible); *Thomas v. Com.*, 170 S.W.3d 343 (Ky. 2005) (prosecutor’s hypothetical question of an expert violated 404(a) by relying on bad character not in evidence). When rehabilitation evidence is admitted before credibility is attacked, error is harmless if credibility is later impeached. *Fairrow v. Com.*, 175 S.W.3d 601, 606 (Ky. 2005) (officer's testimony that the informant's work with the police always resulted in convictions was inadmissible, but harmless due to fact officer later testified).

- b. **Victim, character in general.** The general character of the victim is not admissible under KRE 404(a)(2). *Stringer v. Com.*, 956 S.W. 2d 883, 892 (Ky.1997). The accused may present evidence of a relevant trait of the victim, though this right is limited in sex offense cases by KRE 412 (rape shield). The prosecution is entitled to rebut. *Hampton v. Com.*, 133 S. W. 3d 438 (Ky. 2004).
- c. **Note that under the 2007 amendment to 404(a)(1)** if the defendant attacks the character of the victim, the prosecution may attack the character of the defendant only as to “the same trait of character.”
- d. **Victim’s character for peacefulness.** In homicide cases, if the defendant claims self-defense, or claims the victim was the first aggressor, the prosecution may rebut with evidence of the victim’s trait of peacefulness. The Commonwealth should not be permitted to engage in “anticipatory rebuttal” by introduction of such evidence in its case in chief. It becomes relevant only when the defendant attacks the deceased’s character through cross examination of prosecution witnesses or introduction of evidence during the defense case. *Saylor v. Com.*, 144 S. W. 3d 812 (Ky. 2004); *Caudill v. Com.*, 120 S. W. 3d 635 (Ky. 2003).
- e. **Victim's character for violence** may be introduced in support of a claim that the defendant acted in self-defense or that the victim was the initial aggressor. KRE 404(a)(2). Defendant wanted to introduce outstanding bench warrants against the victim under KRE 404(a). *Taylor v. Com.*, 276 S.W.3d 800, 811 (Ky. 2008) (absent a self-defense claim, no error in excluding bench warrant evidence under KRE 403).
- f. **See KRE 405** for method of introducing victim character evidence.

#### Rule 404(b)

#### DISCUSSION:

Other acts evidence may be important on questions of *corpus delicti*, identity, or *mens rea*. *Billings v. Com.*, 843 S.W.2d 890, 892 (Ky. 1992). Because proof that the defendant has done similar bad acts is more likely to mislead or over-persuade the jury than reputation or character evidence, KRE 404(b) is a rule of general exclusion with only certain specific exceptions. *Sherroan v. Com.*, 142 S. W. 3d 7 (Ky. 2004). Uncharged misconduct is presumed inadmissible unless the proponent passes each part of the three-part test in *Bell v. Com.*, 875 S. W. 2d 882 (Ky. 1994) for relevance, probativeness, and prejudice.

- a. “[T]he trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence ... and decides whether the jury could reasonably find the conditional fact....” *Com. v. English*, 993 S.W. 2d 941, 945 (Ky. 1999). Because the standard is so low, even acts of which the defendant has been acquitted are allowed. *Dowling v. U. S.*, 493 U.S. 342, (1990); *Hampton v. Com.*, 133 S. W. 3d 438 (Ky. 2004). Uncharged crimes and the identity of who committed the uncharged crime can be proved by circumstantial evidence. *Parker v. Com.*, 952 S.W. 2d 209 (Ky. 1997). Judges should include in the record the reasons for findings on admissibility. *Norris v. Com.*, 89 S. W. 3d 411 (Ky. 2002). See KRE 104, notes a) through c).
- b. **Evidence of a prior conviction** may not be used as 404(b) evidence if a direct appeal is still pending, and the mandate has not issued. *Com. v. Duvall*, 548 S.W. 2d 832 (Ky. 1977) (*cf.*, *St. Clair v. Com.*, 140 S.W.3d 510, 570 (Ky. 2004) distinguishing use of a non-final prior conviction in 404(b) context from use of a non-final conviction as a capital aggravator). The resolution of the *Bell* balancing process is reviewed for abuse of discretion. *Matthews v. Com.*, 163 S.W.3d 11, 33 -34 (Ky. 2005).

#### The *Bell* three-part balancing test for 404(b) evidence

## NOTES

1. Is the other bad act evidence relevant for some acceptable purpose? The other act evidence must address a legitimate issue such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Vires v. Com.*, 989 S.W. 2d 946, 948 (Ky.1999). The evidence must address a "fact of consequence" to the disposition of the case. *Daniel v. Com.*, 905 S.W. 2d 76, 78 (Ky.1995); *Bell v. Com.*, 875 S.W. 2d 882, 889 (Ky.1994).
2. Is there sufficient evidence that the prior act occurred and that the defendant committed it? *Bell*, 875 S.W. 2d at 890. The jury must be able to reasonably conclude the act occurred and the defendant was the actor. *Huddleston v. U. S.*, 485 U.S. 681, 690 (1988). Evidence should be limited to showing that the other act occurred and that the defendant probably did the act. Excessive details are unduly prejudicial. *Brown v. Com.*, 983 S.W. 2d 516 (Ky.1999); See also *Parker v. Com.*, 952 S.W.2d 209, 213 (Ky.1997) (noting that in cases of child abuse, "the probative link between evidence of prior bad acts and a particular defendant does not have to be established by direct evidence"). 170 S.W.3d 343).
3. Does the potential for unfair prejudice substantially outweigh probative value? *Bell*, 875 S.W. 2d at 890. Bad acts evidence should be admitted only where the probative value and the need for the evidence outweigh its unduly prejudicial effect. *Rice v. Com.*, 199 S.W. 3d 792, 737 (Ky. 2006). Where value is slight and prejudice great, other acts should be excluded. *Chumbler v. Com.*, 905 S.W. 2d 488, 494, (Ky. 1995). Beware of opening the door: *Dillman v. Com.*, 257 S.W.3d 126, 130 (Ky.App. 2008) (though extremely prejudicial, inquiry was direct rebuttal of denial of selling drugs). The effectiveness of a limiting instruction figures in the balancing process. *Bell*, 875 S.W. 2d at 890.
  - a. **Forbidden inference.** Evidence that shows nothing more than criminal propensity is not admissible. *Harris v. Com.*, 134 S. W. 3d 603 (Ky. 2004). The "forbidden inference" chain goes like this: the defendant committed the prior act; the prior act shows bad character; a person of bad character is likely to commit crimes; therefore the defendant probably committed this crime.
  - b. **Inextricably interwoven acts.** Inextricably intertwined acts are not excluded by 404(b) when mentioning such acts is unavoidable. *Funk v. Com.*, 842 S.W. 2d 476 (Ky.1993). In one case, to show the defendant recently came into money, it was necessary to show where the money went, and a cocaine buy was deemed sufficiently interwoven. *Furnish v. Com.*, 95 S. W. 3d 34 (Ky. 2002). The proponent of other acts evidence must show that the acts are intertwined with evidence "essential" to the case, and that exclusion of the other acts would have a "serious adverse effect on the offering party." KRE 404(b)(2).
  - c. **Stipulation – effect is up to the judge.** A stipulation is a party admission under KRE 801A(b)(2), (3), or (4). If a defendant stipulates one or more elements, *i.e.*, admits identity or a culpable mental state, the need for other acts evidence is greatly reduced, or eliminated. But a defendant may not stipulate away part of the prosecutor's case. *Furnish v. Com.*, 95 S. W. 3d 34 (Ky. 2002). This policy is justified by the prosecution's burden of proof and the double jeopardy prohibition of retrial. But KRE 102, 403, and 611 encourage consideration of time and fairness. See *Anderson v. Com.*, 281 S.W.3d 761 (Ky. 2009) --adopting *Old Chief v. United States*, 519 U.S. 172 (1997) (finding abuse of discretion when trial court refused to permit defendant charged with being a felon in possession of a firearm to concede having a previous felony conviction).

**Preservation**

1) Ask for a mistrial. 2) If not granted, consider asking for an admonition. 3) If an admonition is given, object that it was inadequate to cure prejudice and 4) renew request for mistrial.

Kentucky appellate courts are reluctant to grant relief based on unpreserved 404(b) error. "Instead of delving into an unnecessary KRE 404(b) analysis... this Court simply notes that any possible error in this regard was not of a palpable nature." *Jones v. Com.*, 331 S.W.3d 249, 256 (Ky. 2011) (video of defendant's uncharged drug dealing activity); see also, *Hoff v. Com.*, 394 S.W.3d 368 (Ky. 2011) (error to admit 404(b) evidence without 404(c) notice, not reaching whether error was palpable); but see, *Peyton v. Commonwealth*, 253 S.W.3d 504, 516 -517 (Ky. 2008) (unpreserved 404(b) claim is appropriate to be considered when raised on appeal); and, *United States v. Moore*, 375 F.3d 259, 262 (3<sup>rd</sup> Cir. 2004) (finding plain error in egregious misuse of other crimes evidence).

**Specific Applications of KRE 404(b)**

## NOTES

Fundamental fairness requires that a verdict be predicated on the particular crime charged, and not on prior bad conduct. *Robey v. Com.*, 943 S.W. 2d 616, 618 (Ky.1997). But any legitimate non-propensity purpose can justify admission of other acts evidence.

**Absence of mistake or accident.** Injuries suffered by child prior to charged offense, at times when left in defendant's custody, were admissible when defendant testified he did not know how injuries occurred. *Parker v. Com.*, 952 S.W. 2d 209 (Ky.1997).

**Acquitted crimes** are admissible. *Dowling v. U.S.*, 493 U.S. 342, 348 (1990) (evidence of acquitted crime was admissible pursuant to KRE 404(b) at subsequent trial of related offenses, not double jeopardy), quoted in *Ordway v. Com.*, 352 S.W.3d 584, 591 (Ky. 2011) *cert. denied*, 132 S. Ct. 1575 (2012); see also, *Hampton v. Com.*, 133 S.W.3d 438, 442 (Ky.2004).

**Alternate perpetrator.** To qualify a defense that someone else did the crime, both motive and opportunity must be shown. *Smith v. Com.*, 2012 WL 4222211 (Ky. 2012) (NOT FINAL); *Beaty v. Com.*, 125 S.W.3d 196, 208 (Ky. 2003). Then the standard for admission of "other acts" evidence against the alleged alternative perpetrator ("aaltperp") is lower than for prior bad acts by the defendant. Unfair prejudice is not a concern for "reverse 404(b)" evidence against an "aaltperp." *Blair v. Com.*, 144 S. W. 3d 801, 810 (Ky. 2004). If challenged, the proponent of reverse 404(b) evidence must state a 404(b)(1) exception, *i.e.*, that the evidence is offered to prove the aaltperp's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Smith v. Com.*, 312 S.W.3d 353, 362 (Ky. 2010) (attempt to introduce reverse 404(b) failed for lack of a stated 404(b)(1) exception). Reverse 404(b) evidence is subject to KRE 403 weighing. *McPherson v. Com.*, 360 S.W.3d 207, 213 (Ky. 2012).

**Child sex, domestic violence cases.** Prior bad acts by a defendant against the same victim even from several years back are admissible. *Driver v. Com.*, 361 S.W.3d 877, 885 (Ky. 2012) (permitting prior acts against same victim from four years, three months prior to the charged crime and another episode almost five years prior; note the case was reversed and remanded due to introduction of prior bad acts against a different victim twelve years previously).

**Child sex 404(b).** Also *cf.*, *Colvard v. Com.*, 309 S.W.3d 239, 251 (Ky. 2010) (holding that a 21-year-old conviction for attempted rape of a ten-year-old girl showed modus operandi). *Colvard* doesn't discuss the age of the prior 404(b) bad act.

**Prior false accusations.** A prior false sex abuse accusation by the prosecuting witness against another is admissible if the defense establishes at a KRE 104 hearing that the prior accusation was "demonstrably false." *Dennis v. Com.*, 306 S.W.3d 466, 475 (Ky. 2010). See KRE 412 (rape shield applies to children). "[T]he victim's recantation of the prior allegation, an investigation which establishes pertinent facts wholly inconsistent with the allegation, or circumstances strongly suggesting that the victim had a motive to fabricate the prior and current allegations are all instances potentially justifying" cross-examination of the witness about the prior accusation. *Dennis*, 306 S.W.3d at 475.

**Drug deals (prior) are excludable.** *Graves v. Com.*, 384 S.W.3d 144, 148 (Ky. 2012) (prior drug deals that were "identical" could not be used to show modus operandi as they showed only m.o. of the police); *cf.*, *Pate v. Com.*, 243 S.W.3d 327 (Ky. 2007) (prior possession of items for manufacturing meth was relevant to intent to manufacture meth, and not unduly prejudicial). But testimony explaining why a defendant had become a suspect in a drug investigation is relevant and allows "vague" 404(b). *Peyton v. Com.*, 253 S.W.3d 504, 516-517 (Ky. 2008); *Gordon v. Com.*, 916 S.W.2d 176, 179 (Ky.1995).

**Flight.** Flight can indicate consciousness of guilt when there is enough link between the defendant's flight and the offense to allow a reasonable inference that the defendant left because he feared detection or capture. *Rodriguez v. Com.*, 107 S. W. 3d 215 (Ky. 2003); *cf.*, *Com. v. Bowles*, 237 S.W.3d 137 (Ky. 2007) (flight after subsequent crime evinced guilt of earlier crime) and *Ordway v. Com.*, 391 S.W.3d 762 (Ky. 2013) (efforts to hale a car in immediate aftermath of shooting was admissible as effort to avoid arrest and was inextricably intertwined).

**Incarceration.** A defendant's prior incarceration is excludable under 404(b) when offered purely to show prior prison time. But such evidence is often found harmless. *Anderson v. Com.*, 231 S.W.3d 117, 120 (Ky. 2007) (finding the error harmless due to overwhelming evidence of guilt). Prejudice from evidence that prison guards knew the defendant *from prison* did not outweigh the probative value of the evidence, which explained how they identified him. *Webb v. Com.*, 387 S.W.3d 319 (Ky. 2012). When defendant could have requested an admonition but failed to do so and reference to earlier incarceration and prior

## NOTES

trial were brief, 404(b) error was not palpable. *Mullikan v. Com.*, 341 S.W.3d 99, 104 (Ky. 2011); *Brown v. Com.*, 313 S.W.3d 577, 607 (Ky. 2010) (in a retrial references to prior trials are “inevitable”).

**Intimidation of witness.** Evidence of defendant’s attempt to intimidate a witness to keep her from testifying was properly admitted pursuant to KRE 404(b)(1). *Matthews v. Com.*, 371 S.W.3d 743, 749-750 (Ky. App. 2011); *Foley v. Com.*, 942 S.W.2d 876, 887 (Ky.1996) (allowing evidence that defendant’s mother and father intimidated witness).

**Modus Operandi, pattern, identity.**

1. Evidence that reveals identity of the perpetrator by showing peculiar and striking similarities between prior and current acts, and showing the acts are the “trademark” of the defendant is modus operandi (m.o.) evidence, and should be subject to a “high standard” for admission. *Blair v. Com.*, 144 S. W. 3d 801 (Ky. 2004). A pattern of abuse may be shown in homicide cases if incidents are not too remote. *Jarvis v. Com.*, 960 S.W. 2d 466, 470 (Ky.1998) (prior threats within 3-4 weeks of killing not too remote). Temporal remoteness is becoming less of a concern in child sex cases. *Com. v. English*, 993 S.W. 2d 941, 944 (Ky.1999) (two adult nieces testified def. also abused them as children).
2. Still, prior convictions for sexual abuse must be “strikingly similar” to be admissible as m.o. *Clark v. Com.*, 223 S.W.3d 90, 96 (Ky. 2007). Conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the modus operandi exception. Instead, the modus operandi exception is met only if the conduct that meets the statutory elements evidences such a distinctive pattern as to rise to the level of a signature crime. *Clark*, 223 S.W.3d at 98.
3. Striking similarity can be a close call. Compare *Woodlee v. Com.*, 306 S.W.3d 461, 464 (Ky. 2010) (Though both acts included touching or penetration of the vagina, both girls were very young, defendant was alone with both, he was the father of both, and the acts were close in time, these common facts were “not so peculiar or distinct to show modus operandi.”) and *Montgomery v. Com.*, 320 S.W.3d 28, 33 (Ky. 2010) (three “strikingly similar” cases each involved a victim who was awakened when the defendant reached into her pants, desisted as soon as she awoke without comment or further touching, and left the room). See also *Dant v. Com.*, 258 S.W.3d 12, 19 (Ky. 2008) (the evidence of Dant previously smacking the infant on the head could constitute a pattern of conduct since her death was partly caused by being struck on the head). A pattern of violence as a response to a baby’s crying is allowed to show m.o. *Dant*, 258 S.W.3d at 21. See Domestic violence cases.

**Impeachment with 404(b) evidence** is not allowed on irrelevant, collateral matters. *Shemwell v. Com.*, 294 S.W.3d 430, 435 (Ky. 2009) (defendant’s ownership of a sawed-off shotgun was irrelevant to the drug related crimes for which he was charged; whether he knew his entire house was searched was an irrelevant collateral matter not subject to impeachment). Shotgun evidence was also excludable under 404(b). See KRE 401, relevance.

**Implied or veiled references violate KRE 404(b)(1).** *Wiley v. Com.*, 348 S.W.3d 570, 581 (Ky. 2010) (Officer stated that “being familiar with Mr. Wiley I went back to our division to kind of check for his status, maybe being wanted or anything like that.”) The court ruled this was a 404(b) violation, but in this case it was harmless error.

**Incarceration.** Statements of the robbery detective, Duncan, indicating that he had known the defendant for years and found defendant in “a database,” revealed defendant’s prior criminal record in violation of KRE 404(b), but despite a defense objection, no mistrial was warranted because the reference was “fleeting” and the detective didn’t say it was a “criminal” database. *Tunstall v. Com.*, 337 S.W.3d 576, 591 (Ky. 2011); *Gray v. Com.*, 203 S.W.3d 679, 691 (Ky. 2006) (admonition cured reference to Gray’s criminal past).

**Inextricably intertwined.** Fact that defendant also took victim to Louisville to allow another man to sexually abuse her was an uncharged crime not inextricably intertwined with the charged crime. *Hoff v. Com.*, 394 S.W.3d 368, 381 (Ky. 2011); see also *Clark v. Com.*, 267 S.W.3d 668, 681 (Ky. 2008) “[T] he setting and context of the events surrounding Preston’s discovery of the sexual abuse of her children, and her reasons for not contemporaneously confronting Appellant about it [*i.e.*, other bad acts by the defendant] were germane to the overall sequence of events surrounding the crimes and to the events which led to them being reported to authorities. As such, this evidence was inextricably intertwined with other evidence critical to the case. KRE 404(b)(2).”

## NOTES

**Intent.** There must be a specific issue regarding intent for this exception to apply. Certainly, offenses that require showing of the intentional culpable mental state, KRE 501.020(1), and defenses tending to negate this culpable mental state (e.g., intoxication), give rise to evidence on this point.

**Joinder, bifurcation.** The 404(b) rules often play a crucial role in decisions regarding joinder of offenses for trial. For offenses to qualify for joinder, the crimes must be so strikingly similar as to meet the requirements under KRE 404(b) such that evidence of one offense would be admissible in the trial of the other offense. *Rearick v. Com.*, 858 S.W.2d 185, 187 (Ky. 1993). See also, *Cohron v. Com.*, 306 S.W.3d 489, 495 (Ky. 2010) (improper bifurcation was harmless when the same jury should have heard 404(b) evidence of all of Cohron's charges anyway).

**KASPER evidence.** A doctor's testimony based on an excluded KASPER report and the Commonwealth's insinuation that the defendant had been "doctor shopping" created undue prejudice under KRE 404(b) and KRE 403. *Douglas v. Com.*, 374 S.W.3d 345, 351-52 (Ky. App. 2012) (reversed and remanded). *Oakes v. Com.*, 320 S.W.3d 50, 55 (Ky. 2010) (KASPER evidence inadmissible under 404(b) when used to show character as "excessive prescription refiller").

**Knowledge.** In *Muncy v. Com.*, 132 S. W. 3d 845 (Ky. 2004), evidence of two prior drug buys was admissible to rebut the defendant's claim that he did not know there were drugs in his sofa and that someone must have planted them.

**Manipulative, abusive.** Asking witness if the defendant was "manipulative" or "emotionally or physically abusive" has been treated as eliciting prior bad acts evidence that should have been noticed under 404(c). *Hoff v. Com.* 394 S.W.3d 368, 381 (Ky. 2011).

**Marijuana use, pornography, sex toys, strip clubs, unemployment.** Testimony regarding defendant's marijuana use, possession of pornography, and status of unemployment/poverty violated KRE 404(a) and (b). *Chavies v. Com.*, 374 S.W.3d 313, 321 (Ky. 2012) (unpreserved error). See also *Jenkins v. Com.*, 275 S.W.3d 226, 229 (Ky. App. 2008) (Evidence of possession of pornography and sex toys, and going to strip clubs, and marijuana use did not establish sexual intent toward the children). Evidence of defendant's past marijuana use and allegations he gave the victim prescription drugs was prejudicial and non-probative under 404(b). *Bell v. Com.*, 245 S.W.3d 738 (Ky. 2008), *overruled on other grounds by, Harp v. Com.*, 266 S.W.3d 813 (Ky. 2008). Evidence of possession of pornography and sex toys, going to strip clubs, and marijuana use did not establish sexual intent toward the children. *Jenkins v. Com.*, 275 S.W.3d 226, 229 (Ky. App. 2008).

**Marital infidelity/unconventional sex acts.** Such evidence is a character smear with little probative value. *Chumbler v. Com.*, 905 S.W. 2d 488, 492 (Ky.1995); *Smith v. Com.*, 904 S.W. 2d 220, 222 (Ky.1995).

**Motive.** Other acts may illustrate motive. *Davis v. Com.*, 147 S.W. 2d 709 (Ky.2004) (evidence of obsession with former wife and jealousy of any other man). Evidence of a drug habit, together with evidence of lack of funds, tends to show motive to commit robberies or burglaries. *Caudill v. Com.*, 120 S. W. 3d 635 (Ky. 2003); *Adkins v. Com.*, 96 S. W. 3d 779 (Ky. 2003).

**Opportunity.** This exception provides a means to prove identity, by proving defendant had the opportunity to commit the charged crime, e.g., that he committed another offense at the same location shortly before or after the charged crime. *U. S. v. Merriweather*, 78 F.3d 1070, 1077 (6<sup>th</sup> Cir. 1996) (*opportunity* was not in issue when the defense did not assert a lack of opportunity and, in any event, the Jones conversations were of no probative value in showing that Merriweather had an opportunity to join the Bender conspiracy).

**Penalty phase, uncharged 404(b) misconduct not allowed.** "[S]pecific acts of uncharged misconduct are not factors which a jury may consider in its determination of a defendant's penalty and, therefore, are inadmissible in the penalty phase." *Miller v. Com.*, 394 S.W.3d 402, 407 (Ky. 2011).

**Plan.** As used in KRE 404(b)(1), "plan" refers to two situations: (1) where several crimes are constituents of a larger plan, the existence of which is proved by evidence other than the acts offered; and (2) where a person devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. The 404(b)(1) plan should not be confused with "common plan or scheme" in RCr 6.18, which governs the types of offenses that may be joined in an indictment. Proximity in time is more essential to show an RCr 6.18 common plan than to show 404(b)(1) m.o.. *Com. v. English*, 993 S.W. 2d 941, 944 (Ky.1999) (explaining the common scheme or plan exception).

**Preparation.** *U.S. v. Nolan*, 910 F. 2d 1553 (7<sup>th</sup> Cir.1990) (stealing getaway car for robbery); *U.S. v. Hill*, 898 F. 2d 72 (7<sup>th</sup> Cir. 1990) (obtaining marijuana seeds as preparation for conspiracy to manufacture marijuana). See *Hopkins v. Com.*, 2006 WL 1360889 (Ky. 2006) (unpublished) (discussion and prep for

## NOTES

other burglaries); *U. S. v. Johnson*, 27 F.3d 1186, 1194 (6th Cir. 1994) (preparation was not in issue as there was no suggestion the other acts were preliminary steps necessary to the success of a greater, overall criminal enterprise).

**Protective orders.** Under dicta in *Hoff v. Com.*, 394 S.W.3d 368, 381 (Ky. 2011), if the Commonwealth gives notice of its intent to introduce evidence of protective orders under KRE 404(c), and it can show that the evidence is being offered to show a victim's motive for changing her testimony (and not just defendant's propensity for abusive behavior), it may be appropriate for the trial court to allow the evidence under KRE 404(b).

**Remote prior acts.** Remoteness in time can preclude admission of bad acts evidence. *Gray v. Com.*, 843 S.W. 2d 895, 896 (Ky.1992) (precluding prior incidents 3, 6, 12 years earlier); *cf.*, *Jarvis v. Com.*, 960 S.W.2d 466, 471 (Ky. 1998) (allowing threats 3-4 weeks earlier). The probative value of bad acts evidence can be so diminished by temporal remoteness that it is inadmissible. *Clark v. Com.*, 223 S.W.3d 90, (Ky. 2007) (over 20 years). But *cf.* *Soto v. Com.*, 139 S. W. 3d 827 (Ky. 2004) (permitting evidence of "no contact" order from three years previously, temporal remoteness went only to "weight").

**There is no bright-timeline cut-off for 404(b) evidence.**<sup>3</sup> But prior bad acts or crimes remote in time used to be (and should still be) excludable under 404(b). *Barnes v. Com.*, 794 S.W.2d 165, 169 (Ky. 1990) ("Acts of physical violence, remote in time, prove little with regard to intent, motive, plan or scheme; have little relevance other than establishment of a general disposition to commit such acts; and the prejudice far outweighs any probative value...." The *Barnes* court reversed due to introduction of abuse against the same victim occurring 4½ and 7 years before the date of the alleged murder.

**The Kentucky Supreme Court recently allowed older 404(b) evidence** in a domestic violence case. *See Driver v. Com.*, 361 S.W.3d 877, 884 (Ky. 2012) (arguably overruling *Barnes* by approving evidence of prior bad acts against the same victim almost five years previous to the charged crime). Older prior bad acts may now also be allowed in non-domestic violence cases. In *Gabbard v. Com.*, 297 S.W.3d 844, 857 (Ky. 2009), threatening gun behavior from "several years" previously as well as two weeks previously was admissible to show lack of mistake or accident (Venters dissenting).

**Reverse 404(b).** See Alternate perpetrator.

**Same victim, different victim.** When prior acts against the same victim are alleged, the above-described trend is to admit such acts almost no matter what. "[E]vidence of similar acts perpetrated against the same victim are [now] almost always admissible..." under the exception for evidence offered to prove intent, plan, or absence of mistake or accident. KRE 404(b)(1). *Harp v. Com.*, 266 S.W.3d 813, 822 (Ky. 2008). But note that in *Driver v. Com.*, 361 S.W.3d 877, 885 (Ky. 2012) evidence against a different victim, a former wife, that was 12 years old was disallowed. See also *Clark v. Com.*, 223 S.W.3d 90 (Ky. 2007) (prejudice from prior bad sexual acts over 20 years old outweighed probative value). Prior acts against same victim that are more than five years in the past can still be distinguished. *Driver, supra*. See also Domestic violence cases.

**Tattoos.** Cross-examination regarding defendant's tattoos including a demonic hand, the word "untouchable", and the phrase "only God knows why" suggesting that they conveyed the attitude of one capable of an apparently senseless crime was inadmissible character evidence under KRE 404(b) and unfairly prejudicial under KRE 403. *Brown v. Com.*, 313 S.W.3d 577, 618 (Ky. 2010) (finding the error harmless as to the conviction but not harmless with respect to the [death] sentence).

**Threats** before the charged act may bear on motive. *Sherroan v. Com.*, 142 S. W. 3d 7 (Ky. 2004). See, *Jarvis v. Com.*, 960 S.W. 2d 466, 471-472 (Ky.1998) (evidence of prior threats within 3-4 weeks of the killing were "not too remote"). The defendant's threats against a witness may indicate his consciousness of guilt. *Perdue v. Com.*, 916 S.W. 2d 148, 154 (Ky.1995).

**Yelling.** "[W]e are not willing to classify evidence of yelling as improper 'bad acts' evidence since yelling is not generally considered illegal or immoral conduct." *Utsey v. Com.*, 2007 WL 3226227 (Ky. 2007) (unpublished).

## 404(c)

<sup>3</sup> A conviction over ten years old may not be admitted to impeach credibility of a witness under KRE 609, the Commonwealth has the burden to persuade the court that the probative value of the conviction substantially outweighs its prejudicial effect under KRE 403. *Holt v. Com.*, 250 S.W.3d 647, 651 (Ky. 2008).

**DISCUSSION:****NOTES**

- a. **Alternate perpetrators (aaltperps).** The KRE 404(c) notice requirement is expressly limited to apply only to the prosecution: “In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice....” (emphasis added). No notice is required prior to introduction of evidence of an alternate perpetrator’s prior bad acts. Such acts must pass the three-part balancing test in *Bell*.
- b. **Formal notice is not required.** *Soto v. Com.*, 139 S. W. 3d 827 (Ky. 2004). A letter from the prosecutor is sufficient. *Lear v. Com.*, 884 S.W. 2d 657 (Ky. 1994). But a police report in a discovery response may or may not be sufficient. *Daniel v. Com.*, 905 S.W. 2d 76, 77 (Ky. 1995) (police report in discovery indicating that state spoke to all children present did not provide reasonable pretrial notice of victim's cousin as potential witness to defendant's bad acts); *cf.*, *Matthews v. Com.*, 163 S.W.3d 11, 19 (Ky. 2005) (defendant was sufficiently on notice of prosecution intent to introduce 404(b) evidence from discovery materials and evidence at bond hearing); see also, *Gray v. Com.*, 843 S.W. 2d 895 (Ky. 1992) (entitled to names of the non-complaining witnesses and the nature of their allegations in advance of trial).
- c. **Failure to give notice.** Error was harmless when there was no showing of substantial prejudice and the 404(b) evidence was “a mere repetition of evidence already properly placed before the jury.” *Clark v. Com.*, 267 S.W.3d 668, 681 (Ky. 2008). When no objection was made regarding the lack of notice, the error did not rise to the level of palpable error because of brief mention of a potential prior bad act. *Peyton v. Com.*, 253 S.W.3d 504, 517 (Ky. 2008).
- d. **Limine motion.** Do not rely on a general motion *in limine* to preserve 404(b) objections. When the defendant only specifically objected to the discussion of marijuana on a tape and otherwise made only a general motion in limine, the court limited its review to the portions of the video discussing marijuana and did not reach the discussion of defendant’s prior DUI convictions, and fact he sold drugs to someone's daughter, also on the tape. *Warick v. Com.*, 2012 WL 601246 (Ky. 2012) (Unreported). A continuing objection is also risky. *Lickliter v. Com.*, 142 S. W. 3d 65 (Ky. 2004).
- e. **Opening the door, rebuttal.** The notice requirement is expressly limited to other acts evidence intended for the case-in-chief. If the defendant opens the door during cross-examination, or by introducing evidence, the Commonwealth may rebut by putting on 404(b) evidence to deny or explain, but only to the extent necessary to counter the defendant's evidence.
- f. **Remedies.** Exclusion of evidence is not the only remedy provided for by the rule. But in the absence of a satisfactory excuse for failure to give notice, exclusion should be the standard remedy.
- g. **Sentencing phase.** KRE 404(c) notice is not required for prior bad acts introduced at the sentencing phase. *Garrison v. Com.*, 338 S.W.3d 257, 261 (Ky. 2011).
- h. **Target of evidence doesn’t matter.** No matter against whom prior bad acts evidence will be introduced, notice must be given by the prosecutor. *Parker v. Com.*, 241 S.W.3d 805, 812 (Ky. 2007) (general gang activity evidence not involving the defendant).
- i. **Timing of notice.** Reasonable notice usually required. Fundamental fairness requires reasonable notice of the Commonwealth's intent to introduce 404(b) evidence. *Gray v. Com.*, 843 S.W.2d 895, 897 (Ky. 1992). Notice must occur “at the earliest feasible time” after realizing the evidence is relevant. *Dillman v. Com.*, 257 S.W.3d 126, 129-30 (Ky. Ct. App. 2008) (approving 404(c) notice provided after defense opening statement). *Cf.*, *Daniel v. Com.*, 905 S.W. 2d 76, 77 (Ky. 1995) (holding that defendant must have time to investigate proposed other acts evidence before, not during, trial).

**Rule 405: Methods of proving character**

- a. **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to general reputation in the community or by testimony in the form of opinion.
- b. **Inquiry on cross-examination.** On cross-examination of a character witness, it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct. However, no

## NOTES

specific instance of conduct may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of the inquiry.

- c. **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

**HISTORY:** 1992 C 324, § 5, 34, eff. 7-1-92; 1990, c 88, § 15

**DISCUSSION:**

Prejudice inevitably flows from the selective presentation of negative incidents from a person's past. The purpose of Rule 405 is to define and limit the methods of proving character in order to limit that prejudice.

- a. **Admonishment.** Particularly when the character of the defendant is under examination, introduction of prior negative acts creates the same type of prejudice condemned by KRE 404(b). Although KRE 405(b) allows this type of cross-examination, the jury must be admonished to limit its use to the proper purpose - reflection on the credibility of the witness.
- b. **Collateral facts.** A trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue raised by a party on direct examination. *Com. v. Prater*, 324 S.W.3d 393 (Ky. 2010).
- c. **Cross examination under 405(b)** is limited to relevant instances of conduct. The questioner must have a factual basis for the subject matter of the inquiry. This requirement parallels the attorney's ethical duty under SCR 3.130(3.4)(e). The cross examiner must have a good-faith belief that the incident occurred and that the witness would probably have known about it. Questions about events essentially private in nature cannot test the accuracy, reliability, or credibility of a witness. Such incidents are irrelevant. *U.S. v. Monteleone*, 77 F.3d 1086, 1090 (8<sup>th</sup> Cir. 1996).
- d. **Defendant's state of mind.** Character traits are admissible to prove defendant's state of mind (in the few cases where it is an issue) but only by reputation or opinion evidence. *Sherroan v. Com.*, 142 S.W.3d 7, 21 (Ky. 2004) (proof of EED). *Sherroan* suggests KRE 405 character evidence is also admissible in a case involving extortionate credit transactions to prove the victim's fear of the defendant-lender, and cases where the defense is entrapment, to prove the defendant's predisposition to commit the charged offense. *Sherroan*, 142 S.W.3d at 21-22.
- e. **Foundation required.** Opinion regarding reputation and character are forms of lay opinion that might otherwise be governed by KRE 701. Obviously, a jury will not be impressed by either without an adequate basis of personal knowledge. While neither KRE 405 nor KRE 602 requires a formal foundation, a foundation should be laid carefully and thoroughly.
- f. **Impeachment.** See Collateral facts.
- g. **Prior convictions are not allowed to prove character** under KRE 405. *Blair v. Com.*, 144 S.W.3d 801, 808 (Ky. 2004). Impeachment of a witness by a criminal conviction is governed solely by KRE 609. However, under *Allen v. Com.*, 2013 WL 1181802 (Ky. 2013) (NOT FINAL) any behavior that reflects on the witness's character for truthfulness-including behavior underlying a conviction-may be inquired into on cross-examination. Such conduct may not be proved by extrinsic evidence, except as allowed under KRE 609 You will be stuck with the witness's answer, but under *Allen* you may now inquire about any truthfulness-reflective behavior.
- h. **Victim's character.** Specific instances of conduct are generally not allowed under KRE 405(a). *Dennis v. Com.*, 306 S.W.3d 466, 471 (Ky. 2010) (attempt to elicit sex crime victim's prior false accusation). Only two methods of proof are allowed: reputation and opinion. *Fairrow v. Com.*, 175 S.W.3d 601 (Ky. 2005); see also *Baker v. Com.*, 320 S.W.3d 699, 705 (Ky. App. 2010) (questions regarding the number of cases and whether the informant worked for other agencies violated the spirit of *Fairrow*).
- i. **Self-defense, initial aggressor.** Only reputation and opinion evidence are allowed under KRE 405 to prove the victim's general character. But specific instances of the victim's prior acts of violence, threats, and even hearsay evidence of such acts and threats are admissible under KRE 404(a)(2) to prove the defendant's state of mind, i.e., that the defendant so feared the victim she believed it was necessary to use physical force (or deadly physical force) in self-protection. *Moorman v. Com.*, 325 S.W.3d 325, 332 (Ky. 2010), citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.15[4][d] (4th ed.2003) (evidence properly excluded when defendant failed to



show that she knew of the victim's acts, threats, or statements); *Saylor v. Com.*, 144 S. W. 3d 812 (Ky. 2004).

## NOTES

### **Rule 406: Habit Evidence**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

**HISTORY:** Adopted by Supreme Court Order 2006-06, eff. 7-1-06

Because there are so few decisions, this discussion includes both reported and unreported cases. Unreported decisions may be cited as authority in Kentucky under CR 76.28(4) if no reported authority sufficiently addresses the point and the court is provided with a copy of the decision.

Federal cases are not included here. However, since Rule 406 is borrowed from the Federal Rules without modification, federal cases interpreting FRE 406 may be persuasive.

#### **DISCUSSION:**

**Effective date** – KRE 406 applies in all cases in which the trial first occurred on or after July 1, 2006. For cases involving re-trials, where the original proceedings occurred after July 1, 1992, but prior to July 1, 2006, the 1992 rules apply. *Terry v. Com.*, 153 S.W.3d 794, 802 (Ky. 2005) (at the time of the original trial, habit evidence was not admissible). In cases where the first trial occurred prior to July 1, 2006, the question of habit is addressed under KRE 401, 402, and 403. *Stringer v. Com.*, 956 S.W. 2d 883, 892 (Ky.1997). In cases involving proceedings first occurring prior to 1992, common law applies.

### **Specific Applications of KRE 406**

- a. **Attorney habits.** In a 60.02 proceeding regarding newly discovered *Brady* evidence of an undisclosed deal with a witness, an attorney acknowledged that while he did not remember whether he specifically asked about a plea deal at trial, he believed it was his habit at that time to ask such questions. *Thompson v. Com.*, 2006 WL 2986494 (Ky. 2006) (Unreported) (acknowledging that such habit evidence is now admissible).
- b. **Class habit evidence.** In *Sanderson v. Com.*, 291 S.W.3d 610 (Ky.2009), the Court reiterated the rule that a party cannot introduce evidence of the habit of an entire class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class *because* he/she acted the same way under similar circumstances. This rule applies to investigators, *Miller v. Com.*, 77 S.W.3d 566 (Ky. 2002), to experts, *Sanderson*, and it applies whether the testimony is offered on direct examination of a witness during the Commonwealth's case in chief or on redirect examination for rebuttal or rehabilitation. *Id.*; *Newkirk v. Com.*, 937 S.W.2d 690 (Ky.1996).
- c. **Drinking habits.** Evidence that the defendant only drank Coca-Cola (Coke) and the victim did not drink Coke was properly admissible pursuant to KRE 406 pertaining to habit evidence. *Marshall v. Com.*, 2008 WL 820931 (Ky. App. 2008) (Unpublished) (Coke can was found at victim's house).
- d. **Foundation may be required.** The language in KRE 406 that habit evidence is admissible "whether corroborated or not and regardless of the presence of eyewitnesses" suggests that habit evidence is admissible based on little to no foundation. However, the Court of Appeals appears to agree (in dicta) that if a defendant objects, the Commonwealth would be required to establish a foundation as to how often the witness saw the person whose habit is being described, when and where that occurred, and how often and in what circumstances he observed the habit behavior. *Courtney v. Com.*, 2013 WL 375487 (Ky. App. 2013) (Unreported).
- e. **Driving habits, generally.** The Commentary to KRE 406 provides as follows: "It is contemplated that testimony about a driver's specific behavior (such as activating turn signals) would be admissible under the provision but that testimony about a driver's general behavior (such as always driving carefully) would be inadmissible."
- f. **Driving under the influence.** The argument that four prior DUI convictions should have been admitted as KRE 406 evidence of habit was rejected by the Kentucky Supreme Court in *Little v. Com.*, 2009 WL 1110336 (Ky. 2009) (Unreported).

## NOTES

- g. **Gun habits.** The trial court erred by allowing introduction of two guns owned by the defendant to illustrate the defendant's "preference for, comfort with, and access to" this particular type of weapon. The Kentucky Supreme Court found error for two reasons 1) because the guns were not connected with the crime and were therefore irrelevant, and 2) because owning a certain type of gun does not qualify as a habit. *Harris v. Com.*, 384 S.W.3d 117, 124 (Ky. 2012).
- h. **Habit, definition.** Distinguishing between the habit of carrying a handkerchief, and mere evidence of "ownership," the *Harris* Court stated that "habit" is "focused on one's regular conduct" and quoted from the Commentary to KRE 406:  
  
Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semiautomatic. *Harris v. Com.*, 384 S.W.3d at 124.
- i. **Locking doors, denying entry to strangers.** Evidence that the victim always kept her home securely locked and would not open the door for a stranger was admissible KRE 406 evidence. *Marshall v. Com.*, 2008 WL 820931 (Ky. App. 2008) (Unreported) (no evidence of forced entry).
- j. **Marijuana use.** *Bloxam v. Berg*, 230 S.W.3d 592, 595 (Ky.App. 2007) (evidence regarding doctor's habitual use of marijuana was admissible under KRE 406, but excluded under KRE 403 due to prejudicial effect).
- k. **Moods, habitual.** The defendant failed to object to testimony that every time the defendant did something he should not have done, he was "kind of distant for awhile." The Court of Appeals appears to accept this might have qualified as habit evidence. Defense could have objected and required further foundation. *Courtney v. Com.*, 2013 WL 375487 (Ky. App. 2013) (Unreported) (NON-FINAL). See Foundation.
- l. **Organization habits.** There are no cases related to organizational habit since KRE 406 became effective. However, a case decided prior to KRE 406 allowed a corporate employer who claimed memory loss to rely on habit evidence to counter a race discrimination claim: "...we hold that, where an employer claims that the actual reason cannot be recalled, the employer may rely on normal business practices and exemplary reasons consistent with those practices when called upon under the *McDonnell Douglas* framework of producing a non-discriminatory reason to rebut a plaintiff's *prima facie* case of discrimination." *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 799 (Ky. 2004) (executive director could not remember ten years later why the assistant housing manager position was re-advertised rather than filled by Brooks or another candidate and testified that re-advertising a position was a common practice for the Housing Authority when, for some reason, the personnel director was not comfortable with the top candidates).
- m. **Other rules** informally permit habit evidence, including the "signature/m.o." exception to KRE 404(b), and the prior sexual relationship exceptions in KRE 412(b)(1)(A) and (B).

**Rule 407: Subsequent remedial measures**

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**HISTORY:** Amended by Supreme Court Order 2006-06, eff. 7-1-06; 1992 c 324, § 6, 34, eff. 7-1-92; 1990 c 88, § 17

**DISCUSSION:**

This rule reflects a public policy to encourage repair or improvement measures by excluding mention of them at trial rather than allowing a party to argue that a repair or improvement is an admission that the item or premises were dangerous.

By contrast with Kentucky's version, FRE 407 provides: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." Kentucky's rule does not include the phrase "or culpable conduct." Thus the Kentucky rule --by restricting protection to "negligent" conduct and allowing evidence involving "culpable" conduct--appears to allow evidence of subsequent repairs, etc. in criminal cases. See *Bush v. Michelin Tire Corp.*, 963 F. Supp. 1436, 1447-48, footnote 10 (W.D. Ky. 1996) (unlike the federal rule, KRE 407 also fails to exclude evidence of subsequent measures in products liability cases).

- a. **Impeachment.** A possible use of KRE 407 evidence of subsequent remedial measures is impeachment. The matters must be "at issue" and "of consequence to the determination of the action." A limiting instruction will be necessary in case of impeachment.
- b. **Ownership or control.** A party may use subsequent repair, improvement, or change to show "ownership or control" when that is an issue. The inference is that only the owner or person in control would undertake to repair the item.
- c. **Reckless, wanton state of mind.** KRE 407 could also apply in criminal cases when failure to perceive a risk [reckless/wanton culpable mental state] is an element. Remedial measures evince awareness of risk.

#### **Rule 408: Compromise and offers to compromise**

Evidence of (1) Furnishing or offering or promising to furnish; or (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 18.

#### **DISCUSSION:**

KRE 408 encourages compromise and settlement by preventing later use of an offer to compromise (or discussions leading up to the offer) as an admission of guilt or liability. The rule does not preclude admission for some other purpose. *God's Center Foundation v. LFUCG*, 125 S. W. 3d 295 (Ky. App. 2003). Such evidence is available to show the bias or prejudice of a witness (the witness is testifying because not offered enough to compromise the claim) or an attempt to obstruct criminal investigation or prosecution (an attempt to buy off the witness).

- a. **Statements to police officers in reliance on false promises not to "prosecute."** In *Sloan v. Com.*, 2004 WL 595648 (Ky.App. 2004) (Unreported) relief was denied because the court accepted the police officers denials that they made promises. However, *Sloan* lists cases finding a due process violation when a police promise not to prosecute was fraudulent because it was beyond the officer's authority: *State v. Sturgill*, 469 S.E. 2d 557 (N.C.App.1996); *Com. v. Stipetich*, 652 A. 2d 1294 (Penn.1995); *People v. Gallego*, 424 N.W. 2d 470 (Mich.1988); *People v. Fisher*, 657 P. 2d 922 (Colo.1983). The Court of Appeals in *Sloan* indicated it would have reached a different result if the defendant had proved that police made the false promises.
- b. **Statements to third party about plea negotiations.** KRE 408(2) expressly allows use of compromise negotiation evidence to prove "bias or prejudice of a witness." By contrast KRE 410 excludes only statements made *to the prosecuting authority* during plea bargaining, not to statements made to a third party. *Bratcher v. Com.*, 151 S.W.3d 332, 333-34 (Ky. 2004) (defendant's statements to his brother describing negotiations were not protected); *Girton v. Com.*, 2009 WL 427229 (Ky. 2009) (Unreported) (statements to co-defendant regarding negotiation with prosecutor were admissible under KRE 408).

## NOTES

**Rule 409: Payment of medical and similar expenses**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

**DISCUSSION:**

This rule appears to apply to criminal as well as civil cases. Compare the discussion under KRE 407 regarding “culpable conduct.”

**Rule 410: Inadmissibility of pleas, plea discussions, and related statements**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

1. A plea of guilty which was later withdrawn;
2. A plea of nolo contendere in a jurisdiction accepting such pleas;
3. Any statement made in the course of formal plea proceedings, under either state procedures or Rule 11 of the Federal Rules of Criminal Procedure, regarding either of the foregoing pleas; or
4. Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a plea or statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

**HISTORY:** Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 7, 34, eff. 7-1-92; 1990 c 88, § 20

**DISCUSSION:**

The 2007 amendment eliminates language that prohibited the use of an *Alford* plea.<sup>4</sup> Based on the amendment, prior convictions based on *Alford* pleas are now clearly admissible for impeachment purposes or to prove persistent felony offender status. *See also, Pettitway v. Com.*, 860 S.W. 2d 766 (Ky. 1993). The amendment clarifies that the last paragraph’s rule of completeness, beginning with the words “However, such a plea or statement...” applies to all subsections of the rule.

- a. **Admissions against interest.** The rule precludes use of pleas and discussions as admissions against interest which might otherwise be authorized under KRE 801A(b). *Pettitway v. Com.*, 860 S.W. 2d 766, 767 (Ky.1993).
- b. **“Course of plea discussions,” timing.** A two-prong test applies in determining whether a defendant’s statements have been made in the course of plea discussions: “[w]hether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and whether the accused’s expectation was reasonable given the totality of the objective circumstances.” *Kreps v. Com.*, 286 S.W.3d 213, 219 (Ky. 2009), *citing Roberts v. Com.*, 896 S.W. 2d 4, 5-6 (Ky.1995).
- c. **Statements made after a plea agreement has been reached** are not entitled to the exclusionary protection of KRE 410. *Meece v. Com.*, 348 S.W.3d 627, 650 (Ky. 2011), *cert. denied*, 133 S. Ct. 105 (2012).
- d. **Parties to the discussion.** To be covered, the plea discussion must be with the prosecutor or the prosecutor’s agent. *Bratcher v. Com.*, 151 S.W.3d 332, 333-342 (Ky. 2004) (statements to brother describing negotiation were not protected); *Girton v. Com.*, 2009 WL 427229 (Ky. 2009) (Unreported) (statements to co-defendant regarding negotiation were not protected). Discussions with the police are not protected unless the police are acting with the express authority of the prosecutor or state they are acting with such authority. *Clutter v. Com.*, 364 S.W.3d 135, 138 (Ky. 2012); *Kreps v. Com.*, 286 S.W.3d 213, 219 (Ky. 2009) (officer telephoned prosecutor in presence of defendant and communicated that he was acting with the prosecutor’s authority). Because KRS 15.700 provides for a unified prosecutorial system, discussions with a

<sup>4</sup> *Alford v. North Carolina*, 394 U.S. 956 (1969).

## NOTES

county attorney in a felony case should be protected, because both county and commonwealth attorneys are attorneys for the prosecuting authority.

- e. **Withdrawn pleas, Alford pleas.** Rule 410 insulates the defendant from later use of *withdrawn* guilty pleas and *nolo contendere* pleas, statements made at the entry of such pleas, and statements made in bargaining for a plea that did not take place or was later withdrawn. Pleas that have not been withdrawn are not exempted. *Porter v. Com.*, 892 S.W. 2d 594, 597 (Ky.1995). The rule excludes the defendant's statements during the taking of a withdrawn guilty plea or entering an *Alford* or *nolo* plea. *LFUCG v. Smolic*, 142 S. W. 3d 128 (Ky. 2004).
- f. **During a PSI investigation.** Statements made to officers conducting PSI investigations might be covered by the rule if the plea is later withdrawn. *Roberson v. Com.*, 913 S.W. 2d 310, 316 (Ky.1994), *abrogated on other grounds*, *Ward v. Com.*, 62 S.W.3d 399, 400 (Ky. App. 2001).
- g. **Prior pleas, Alford, nolo pleas.** The rule does not protect *Alford* or *nolo contendere* pleas as evidence of prior convictions in KRS 532.055 or KRS 532.080 hearings. The rule protects statements made by the defendant, but not criminal convictions. *Pettway v. Com.*, 860 S.W. 2d 766, 767 (Ky. 1993) and *Whalen v. Com.*, 891 S.W. 2d 86, 89 (Ky.App.1995), *overruled on other grounds by Moore v. Com.*, 990 S.W.2d 618 (Ky.1999) authorize use of prior pleas in sentencing, despite the fact such use is certainly an admission.
- h. **Perjury.** If the defendant is tried for perjury, false statements made under oath, on record, and in the presence of counsel, as well as plea statements may be admitted.
- i. **Police and prosecutors not protected.** This rule exists for the protection of the criminal defendant only. Statements by the police or prosecutors in plea discussions or at the pleas themselves, if relevant, can be introduced as party admissions pursuant to KRE 801A(b)(2), (3), or (4). However, KRE 410(4)(a), a special application of the rule of completeness, allows the prosecution to introduce other parts of the plea or plea discussions that "ought in fairness be considered contemporaneously with it." Use of prosecution statements made during plea negotiations is an available but risky tactic.

### **KRE 411: Liability insurance**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 21

#### **DISCUSSION:**

This rule primarily supports the public policy of mandatory insurance for automobiles and generally encourages insurance. It does so by denying a party the inference that insureds tend to be less careful than uninsureds, and preventing knowledge of insurance coverage to cause the jury to impose liability without regard to fault. *Robinson v. Lansford*, 222 S.W.3d 242 (Ky.App. 2006).

- a. **Rule applies in criminal case.** The rule applies in criminal cases. *Justice v. Com.*, 987 S.W. 2d 306, 314 (Ky.1998) (in first-degree assault and DUI case, victim testified his expenses were \$200,000 and defendant had no insurance –harmless error).
- b. **Exceptions.** Proof of insurance is admissible as evidence of ownership, agency, or control of property, as well as witness bias. *Baker v. Kammerer*, 187 S.W.3d 292, 295 (Ky. 2006); If there is other evidence to prove these points, however, the policies underlying this rule and KRE 403 counsel exclusion.
- c. **Bias or prejudice.** Proof that a person is insured may be circumstantial evidence of bias or prejudice on the theory that the insured person will testify as he believes his insurable interest dictates. *Earle v. Cobb*, 156 S.W.3d 257, 261-262 (Ky. 2004).
- d. **Limiting instruction.** If evidence of insurance is introduced over KRE 403 objection, a limiting instruction is necessary.

### **Rule 412: Rape and similar cases - admissibility of victim's character and behavior**

## NOTES

- a. **Evidence generally inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
  1. Evidence offered to prove that any alleged victim engaged in other sexual behavior.
  2. Evidence offered to prove any alleged victim's sexual predisposition.
- b. **Exceptions:**
  1. In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
    - A. evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
    - B. evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
    - C. any other evidence directly pertaining to the offense charged.
  2. In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
- c. **Procedure to determine admissibility.**
  1. A party intending to offer evidence under subdivision (b) must:
    - A. file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
    - B. serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
  2. Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

**HISTORY:** Amended by Supreme Court Order 2003-3, eff. 7-1-03; 1992 c 324, § 29, 34, eff. 7-1-92; 1990 c 88, § 22

**DISCUSSION:**

This rule ensures that the prosecuting witness is not put on trial by the defense through irrelevant evidence. *Anderson v. Com.*, 63 S. W. 3d 135 (Ky. 2001). It was adopted to end the practice of deeming the chastity of an adult female relevant to “the reasonableness of her story” and allowing instances of prior “unchastity” as evidence bearing on this point. *Roberson’s New Kentucky Criminal Law and Procedures*, 2 Ed., 779-784 (1927). The rule attempts to strike a balance between the defendant’s right to confront the witness and to present a defense and the need to shield the jury from irrelevant, salacious details about the prosecuting witness.

Rule 412 is a rule of general exclusion, subject to three exceptions in KRE 412(b)(1)<sup>5</sup>:

1. **Identification of semen, or cause of injuries**

KRE 412(b)(1)(A) authorizes introduction of evidence at a criminal trial of past sexual behavior with others for specific purposes, *i.e.*, identification of the donor of the semen and other physical evidence and to show a cause of injuries not attributable to the defendant.

2. **Sex with the accused, consent**

<sup>5</sup> *Garrett v. Com.*, 48 S. W. 3d 6 (Ky. 2001)

## NOTES

KRE 412(b)(1)(B) permits proof of specific acts of sexual behavior with the accused as evidence of consent. In cases where the prosecuting witness is deemed legally incapable of giving consent, such evidence would be irrelevant. *Cf., Hillard v. Com.*, 158 S.W.3d 758, 762-763 (Ky. 2005) (such evidence was irrelevant to prove A.W.'s sexual orientation, relationship with other witness, and /or bias against defendant.) **Sexual thoughts** about the accused qualify for admission under this exception. *Com. v. Young*, 182 S.W.3d 221 (Ky.App. 2005) (sexual fantasy about defendant police officer).

### 3. Other evidence directly pertaining to the act charged

KRE 412(b)(1)(C) is a catch-all exception to the rape shield rule that allows introduction of other sexual behavior pertaining directly to the act charged. Other acts must be "directly" relevant. One obvious example is mistake of age, an affirmative defense established by KRS 510.030. Presumably, knowledge of the sexual history of the prosecuting witness with others could be the basis of a defendant's reasonable belief that the witness was capable of consent or was of age.

Beware: Even if the evidence in question falls within the exceptions enumerated at KRE 412(b)(1), such evidence may still be excluded if its probative value is outweighed by its prejudicial effect. KRE 403. *Cecil v. Com.*, 297 S.W.3d 12, 17 (Ky. 2009) (evidence that runaway had sex with four different men).

- a. **Child concocting, fabricating, or transferring.** Where there is a substantial possibility that a child victim may be "concocting" a charge related to sexual behavior or "transferring" an accusation of something that may have actually happened, but with someone else, due process and fundamental fairness entitle a defendant to present evidence of fabrication. *Mack v. Com.*, 860 S.W. 2d 275, 277 (Ky. 1993). In *Mack*, the victim's privacy rights gave way to the defendant's rights under the state and federal Constitutions to a fair trial, including the right to confront witnesses.
- b. **Child victims are protected as well as adults.** Because "[m]inors no less than adults can find questions about their sexual activities humiliating and offensive," the rape shield rule in KRE 412 also applies to child victims, and to involuntary as well as voluntary sexual conduct. *Montgomery v. Com.*, 320 S.W.3d 28, 39 (Ky. 2010). The *Montgomery* ruling places Kentucky among the majority of states on the issue. A minority still holds that an underage victim's prior sexual behavior is not barred, because such behavior cannot possibly be the victim's fault. *See, State v. Budis*, 593 A. 2d 784, 791-792 (N.J. 1991) (citing similar cases from Arizona, Maine, Massachusetts, Nevada, New Hampshire, New York and Wisconsin, plus law review articles).
- c. **Child sexual history admissible:** The Court in *Montgomery, supra*, did not overrule *Barnett v. Com.*, 828 S.W. 2d 361 (Ky.1992) which holds that if a physician had known of the victim's ongoing sexual conduct with her brother, he might not have said the defendant was the assailant. *Barnett* holds that the trial court's exclusion of evidence of prior sexual contact between the underage complaining witness and her brother --without first determining the relevance of such evidence-- violated the defendant's right to a fair trial and the right to present a defense. *Montgomery* expressly preserves the application of the KRE 412(b)(1)(C) residual exception to the rule "if, and only if, exclusion of the evidence would be arbitrary or disproportionate with respect to KRE 412's purposes of protecting the victim's privacy and eliminating unduly prejudicial character evidence from the trial." *Montgomery v. Com.*, 320 S.W.3d at 43.
- d. In *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 711 (Ky. 2009) it was reversible error to exclude a child's medical records and prior sexual history, relevant to damages, etc. *See also, McCullum v. Com.*, 2006 WL 436107 (Ky. 2006) (Unreported) (17-year-old's diary showing her extreme sexual history was admitted under residual exception). Note *Brooks* and *McCullum* both involve older child victims with extreme sexual histories.
- e. **False allegations must be demonstrably false.** A prior accusation by the prosecuting witness against another is admissible in a sex offense trial only if the defense establishes at a KRE 104 hearing that the prior accusation was "demonstrably false." *Dennis v. Com.*, 306 S.W.3d 466, 475 (Ky. 2010). A defendant must show a "distinct and substantial probability" of falseness. *Id.* If this condition is met and the evidence is "probative of truthfulness or untruthfulness" under KRE 608(b), it must still pass the balancing test in KRE 403 in order to be admissible. *Dennis v. Com.*, 306 S.W.3d 466, 469 (Ky. 2010). *Berry v. Com.*, 84 S. W. 3d 82 (Ky. App. 2001).

## NOTES

- f. **Multiple false allegations.** "...if the manner of making multiple claims creates an inference of falseness based on the alleged victim's motives and the volume of claims, it becomes a jury question of how much weight to give to the claims rather than a question of law as to admissibility. *Perry v. Com.*, 390 S.W.3d 122, 131 (Ky. 2012).
- g. **Hearing.** KRE 412 (c)(2). The judge must conduct a hearing before admitting any evidence that might come under the rape shield rule. The alleged victim and the parties must be given the opportunity to attend and be heard. Presumably, the prosecuting witness may appear with counsel at the hearing.
- h. **Commonwealth's Attorney role at hearing.** The attorney for the Commonwealth represents the government. KRS 15.725; SCR 3.130 (1.13). The prosecutor is not the lawyer for the prosecuting witness at a hearing prescribed by 412(c)(2). The Commonwealth's Attorney should be limited to explaining how the introduction of the proposed evidence will deny his client, the government, a fair trial, not how it will affect the prosecuting witness.
- i. **Contents of motion, timing.** KRE 412(c)(1)(A) requires a defendant wishing to introduce evidence of prior sexual conduct to file a *written* motion 14 days before the scheduled first day of trial, although the judge may allow later filing for new evidence not discovered by due diligence or the raising of a new issue. In the motion, the defendant must specifically describe the evidence sought to be admitted and identify the purpose of the evidence.
- j. **Procedure.** Subsection (2) does not prescribe any particular procedure at the hearing. The defendant may call the prosecuting witness or any other witness. Because in most cases the admissibility of evidence will be determined pre-trial, it may be good to ask the judge for a written ruling. KRE 103(d).
- k. **Notice.** The moving party must serve the motion on all other parties to the action and must serve a copy on the witness or the witness's guardian. Service of the motion is not a substitute for a subpoena. If you want a witness at the hearing, you must also comply with RCr 7.02.
- l. **Record of hearing,** use for impeachment, substantive evidence. KRE 412(c)(2) mandates sealing the record of the hearing unless the judge rules otherwise. Obviously, the record could be used to impeach the prosecuting witness at trial under KRE 801 A(a)(1) and KRE 106. If the prosecuting witness suffers loss of memory at trial but testified on that subject at the hearing, the video tape or transcript could be introduced as substantive evidence under KRE 801 A(a)(1), 804(a)(3), and 804(b)(1). However, until the judge authorizes such use, the record remains unavailable. Refusal to allow impeachment with the prior hearing could implicate the defendant's 6<sup>th</sup> Amendment right of confrontation.
- m. **Ruling.** If the judge finds that the evidence qualifies under the rule and the probative value is not outweighed by the danger of unfair prejudice, the evidence is admissible. *Berry v. Com.*, 84 S. W. 3d 82 (Ky. App. 2001). Judges should include in the record the reasons for findings on admissibility. *Norris v. Com.*, 89 S. W. 3d 411 (Ky. 2002).
- n. **Reputation, opinion evidence excluded.** KRE 412(a) explicitly precludes introduction of evidence of prior sexual behavior or predisposition. This necessarily includes reputation and opinion evidence as well as specific acts. The rule prescribes rigid procedural steps which must be taken to introduce evidence on the limited subjects the rule permits.



## Article V: Privileges

## NOTES

Article V privileges are meant to apply in proceedings in the Court of Justice, and therefore privileges that are found outside the rules, while applicable to court proceedings, will also be applicable in any other government proceeding. Privileges may be found throughout the Kentucky Revised Statutes: KRS Chapter 421, and Chapter 194 for CHR records or Chapter 61 for records not falling under the open records law.

Privileges are construed narrowly because they are exceptions to the *KRE 501* duty to testify and because they often keep relevant evidence from the jury. However, the enactment of privileges in the first place is a recognition both by the Supreme Court and by the General Assembly that there are some areas of communication that should be private. The General Assembly and the Supreme Court, by adopting rules of privilege, already have balanced the pros and cons of keeping certain evidence from juries. Neither attorneys nor trial judges should attempt to undermine the policy expressed in the privileges. In many instances, there will be no question that a claimed privilege applies or does not apply. However, for the many instances in which there may be a question, courts should not presume against the claimant. Rather, the court should make an even-handed determination and should require the opponent of the privilege to show why it should not be indulged. *Stidham v. Clark*, 74 S.W. 3d 719 (Ky.2002).

### **KRE 501: General rule**

Except as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Court of Kentucky, no person has a privilege to:

1. Refuse to be a witness;
2. Refuse to disclose any matter;
3. Refuse to produce any object or writing; or
4. Prevent another from being a witness or disclosing any matter or producing any object or writing.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 23

### **DISCUSSION:**

Any person properly summoned to the witness stand under *RCr 7.02* or *KRS 421.190* cannot lawfully refuse to be a witness, refuse to disclose any “matter” or refuse to produce any object or writing unless the person claims a privilege under the Federal or Kentucky Constitutions or Kentucky statute or court rule. The rule clearly implies that the courts cannot create common law privileges. *Stidham v. Clark*, 74 S. W. 3d 719 (Ky. 2002). No person may prevent another from being a witness or disclosing any matter or producing any object or writing unless that person is privileged to do so. Although there is no penalty attached to this rule, *KRS Chapter 524* provides criminal penalties for tampering with, intimidating, or bribing a witness. Moreover, *KRE 804(b)(5)*, effective July 1, 2004, authorizes introduction of hearsay statements of a witness who is unavailable at trial because of a party’s interference.

- a. Whether a privilege exists is preliminary question for the court, per *KRE 104*. *KRE 104(a)* requires the court look at the facts and circumstances surrounding the relationship not the substance of the privileged conversation. *U.S. v. Zolin*, 491 U.S. 554, 109 S.Ct 2619, 105 L.Ed.2d 469 (1989).
- b. Privileges generally apply to communications – written and oral. However, an argument exists that the privileges extend to nonverbal actions and knowledge gathered through observation. Specific nonverbal issues are addressed in the specific privilege rules.
- c. Privilege does not apply where confidentiality is compromised, to wit: by the presence of a third party not essential to the communication.
- d. Only the holder of the privilege may assert it. See the specific rules to determine holder.
- e. Privileges only apply where the need for confidentiality exists. Example: when a client sues his attorney, the need for confidentiality of the communications does not exist. Thus, the privilege is waived.

## NOTES

**KRE 502: (Number not yet utilized.)****KRE 503: Lawyer-client privilege****a. Definitions.** As used in this rule:

1. "Client" means a person, including a public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
2. "Representative of the client" means:
  - A. A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or
  - B. Any employee or representative of the client who makes or receives a confidential communication:
    - i. In the course and scope of his or her employment;
    - ii. Concerning the subject matter of his or her employment; and
    - iii. To effectuate legal representation for the client.
3. "Lawyer" means a person authorized, or reasonably believed by the client to be authorized to engage in the practice of law in any state or nation.
4. "Representative of the lawyer" means a person employed by the lawyer to assist the lawyer in rendering professional legal services.
5. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

**b. General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
2. Between the lawyer and a representative of the lawyer;
3. By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;
4. Between representatives of the client or between the client and a representative of the client; or
5. Among lawyers and their representatives representing the same client.

**c. Who may claim the privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.**d. Exceptions.** There is no privilege under this rule:

1. Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
2. Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos;

## NOTES

3. Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
4. Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and
5. Joint clients. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

**HISTORY:** 1992 C 324 § 8, 34, EFF. 7-1-92; 1990 C 88, § 25

**DISCUSSION:**

This rule protects most communications between clients and attorneys. Subsection (a)(5) defines a “confidential communication” as one made in the furtherance of rendition of legal services not intended to be disclosed to third persons. Communication is given a broad definition as either words or actions intended to communicate some meaning to the attorney or the attorney’s assistants. But where acts may be interpreted as “non-communicative” the attorney may be compelled to testify. *St Clair v. Commonwealth*, 140 S.W. 3d 510 (Ky.2004).

Under subsection (b), communications may be between the client, the client’s representative, the attorney, or the attorney’s representative, in any combination, as long as the communication was not intended for disclosure to others and concerns some sort of rendition of legal services. This means that communications to investigators, secretaries and clerks fall under the privilege. *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W. 3d 796 (Ky.2000). The claimant must show that an attorney client relationship existed at the time of the communication. This can be inferred from conduct as well from the existence of a contract or a court appointment. *Lovell v. Winchester*, 941 S.W. 2d 466 (Ky.1997).

- a. **Defendant can waive privilege.** See *Stinnett v. Commonwealth*, 364 S.W.3d 70, 86 (Ky. 2011) (client can waive the attorney client privilege by placing the substance of the communication in issue. Letter from former counsel to defendant admissible during defendant’s trial).
- b. **Practice of law, defined.** SCR 3.020 defines the practice of law as “any service rendered involving legal knowledge or legal advice” which involves “representation, counseling, or advocacy in or out of court and which concerns the rights, duties, obligations, liabilities or business relations of the one requiring the services.” If the communication is about one of these topics, it should fall under the attorney-client privilege. If it does not, for example where the attorney is acting as a business advisor, the privilege does not apply. *Lexington Public Library v. Clark*, 90 S.W. 3d 53 (Ky.2002).
- c. **Rule covers only disclosure a court can force.** This rule is not the only mandate of client confidentiality. SCR 3.130(1.6) prohibits an attorney from disseminating “information” about a client or case unless compelled to by law. KRE 503 deals only with the question of what a court may require an attorney, a client, or a representative of either to disclose in a court proceeding. All other situations are governed by SCR 3.130(1.6). The Commentary to Rule 1.6 says that a lawyer has an ethical duty to invoke the attorney-client privilege until the client says otherwise. KRE 503(c) says the lawyer may claim the privilege, but only on behalf of the client, not himself.
- d. **Client may refuse, and prevent others.** The privilege as set out in subsection (b) is that a client may refuse to disclose confidential communications and may prevent any other person from disclosing these communications as long as they were made for the purpose of facilitating rendition of professional legal services to the client. As you can see from the rule, this involves a number of fact scenarios which are listed. See *Howard v. Commonwealth*, 318 S.W.3d 607, 616(Ky. 2010). (The guardian ad litem for an alleged child sex abuse victim cannot be compelled to testify to statements made to him/her by the alleged victim at the defendant’s trial. The fact that the statements come out or are presented to the family court does not waive the attorney client privilege since family court proceedings are confidential. )
- e. **Erroneous forced disclosure.** Under KRE 510(1) a privilege is not lost forever if it is compelled erroneously. The thinking behind this rule is that the attorney must submit to the lawful order of the court (mistaken or not) but that the privilege which ordinarily would be lost upon disclosure can be restored on appeal or reconsideration.

## NOTES

- f. **Exceptions to the privilege.** In subsection (d) the drafters list the exceptions to the privilege. In keeping with the ethical rule, if the lawyer knows that the client consulted him for the purpose of committing or assisting anyone to commit or to plan “what the client knew” or should have known was a crime or fraud the privilege does not apply. It is not what the attorney knew or reasonably should have known, it is what the client knew or should have known.
- g. **Where the lawyer and client are adverse parties,** there is no point having a privilege because information that would be privileged would also be essential to the disposition of the case. In *Rodriguez v. Commonwealth*, 87 S.W. 3d 8 (Ky.2002), the court held that the privilege is waived “automatically” when a client testifies adversely to her attorney. However, the court also held that the waiver was limited to the matters raised by the client and could not be deemed a “blanket” waiver.
- h. **Likewise, where an attorney’s only relationship was as an attesting witness,** the lawyer is not acting in the capacity as a counselor or advocate, and therefore the privilege does not apply. Where there are clients who have a joint interest, in certain instances there would be no point in having the privilege because the clients could not reasonably expect the attorney not to let the other side know. In such instances, it would not be reasonable to keep this information out of evidence if the clients later have an adversary relationship.
- i. **Successor counsel.** The client’s file belongs to the client, not the attorney. A lawyer must surrender the client’s case file to successor counsel or to the client acting *pro se*, even if not reimbursed for the trouble of providing it. KBA Opinion E-395 (March 1997).
- j. **Work product.** Work product belongs to the attorney, not the client. Disclosure cannot be compelled against the attorney’s wishes. *Morrow v. B, T, & H*, 957 S.W.2d 722 (Ky.1997) contains a discussion of the work product privilege in Kentucky. However, the work product rule does not apply to bar a client from obtaining her entire file. *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir.1982).

**KRE 504: Husband-wife privilege**

- a. Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.
- b. Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder’s guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.
- c. Exceptions. There is no privilege under this rule:
  - 1. In any criminal proceeding in which sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charged;
  - 2. In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:
    - A. The other;
    - B. A minor child of either;
    - C. An individual residing in the household of either; or
    - D. A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence. Or
  - 3. In any proceeding in which the spouses are adverse parties.
- d. Minor Child. The court may refuse to allow the privilege in any proceeding if the interests of a minor child of either spouse may be adversely affected.

**HISTORY:** Amended by Supreme Court Order 2006-06, eff. 7-1-06; 1992 c 324, § 9, 34, eff. 7-1-92; 1990 c 88, § 26

**DISCUSSION:**

## NOTES

**Subsection (a)** allows the spouse of a party to refuse to testify against party-spouse concerning “events occurring after the date of their marriage.” This is usually characterized as the “spousal privilege.” The party-spouse may also prevent the spouse from testifying concerning the same events. This second aspect of the privilege is usually referred to as the “adverse testimony privilege” because it allows one spouse to forbid the other to testify.

- a. **Are they spouses?** Assertion of the privileges requires claimant to prove the existence of a valid, ongoing marriage at the time spousal testimony is sought. The privilege does not survive divorce. *See Winstead v. Commonwealth*, 327 S.W.3d 386, 392 (Ky. 2010).
- b. **Separation/filing for divorce.** Under federal law, the privilege does not apply. No Kentucky case addresses whether separation and or filing for a divorce is sufficient to overcome the privilege. *Gonzalez De Alba v. Commonwealth*, 202 S.W.3d 592, 596 (Ky.2006).
- c. Either privilege must be asserted in a timely fashion by the party holding the privilege. *White v. Commonwealth*, 132 S.W. 3d 877 (Ky. App.2003). A wife cannot assert the husband’s “spousal” privilege and vice versa. *Pate v. Commonwealth*, 134 S.W. 3d 593 (Ky.2004).

**Subsection (b) protects confidential communications.**

- a. Kentucky courts have defined “confidential” as communications “made privately by an individual to his or her spouse,” which are not meant to be divulged. *Slaven v. Commonwealth*, 962 S.W.2d 845, 853 (Ky.1997). Statements made in the presence of others indicates the communication was not intended to be confidential. *White v. Commonwealth*, 132 S. W. 3d 877 (Ky. App.2003). *See also Winstead v. Commonwealth*, 327 S.W.3d 386 (Ky. 2010) (Spouse’s observation of the time the defendant arrived home on the night of the murder was not a privileged/confidential non-verbal communication under 504(b) because third parties outside the marriage could have observed and testified to the time the defendant returned home.)
- b. Historically, Kentucky courts have defined “communications” broadly. “It should not be confined to a mere statement by the husband to the wife or *vice versa*; but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party.” *Slaven v. Commonwealth*, 962 S.W.2d 845, 851 (Ky. 1997)(Citations omitted) **CAVEAT**, in dicta, in *Winstead v. Commonwealth*, 327 S.W.3d 386, 393 (Ky. 2010), the court noted Kentucky courts may be defining “communications” too broadly.
- c. The marital communication exception under 504 b survives divorce. *Winstead v. Commonwealth*, 327 S.W.3d 386 (Ky. 2010)
- d. **False Alibis.** The act of requesting one’s spouse to give the police a false alibi is a confidential marital communication protected by 504(b). The communication must be communicated privately to the spouse and the request itself must not be intended for disclosure to others. “But the privilege is inapplicable if the evidence shows that the request to convey a false alibi was not made privately between the spouses—at least one other person was present when the request was made—or if the evidence shows that the requesting spouse intended to disclose to others the particular request that spouse made to the other.” *Winstead v. Commonwealth*, 327 S.W.3d 386, 394 (Ky. 2010)

**Privilege does not apply where:**

- a. The Commonwealth introduces a *prima facie* case that the spouses are conspirators or accomplices in a crime that is the subject matter of the case. *Pate v. Commonwealth*, 134 S.W. 3d 593 (Ky. 2004).
- b. One of the spouses is charged with wrongful conduct against the other spouse, a minor child of either, an individual residing in the household of either, or a third person injured during the course of wrongful acts against the spouse, child, or other individual. *Lester v. Commonwealth*, 132 S.W. 3d 857 (Ky. 2004). *See also, Meyers v. Commonwealth*, 381 S.W.3d 280 (Ky. 2012) (Possession of a handgun by a convicted felon charge which was severed from other substantive offenses perpetrated against defendant’s wife was not an offense against her within the meaning of 504(c)(2)(A) thus spouse’s testimony against defendant violated the marital privilege.)
- c. The judge also may refuse to allow the privilege “in any other proceeding” if the interest of a minor child of either spouse may be adversely affected. Obviously, if the spouses are adverse parties it would be unfair to afford either of them a privilege.

## NOTES

- d. KRS 620.030 imposes a duty on practically every adult to report child abuse to police, or to the commonwealth's and county attorneys. KRS 620.050(2) expressly states that the husband/wife and any professional/client/patient privileges except the attorney/client and clergy/penitent privileges do not excuse a person from the duty to report. These privileges will not apply "in any criminal proceeding in district or circuit court regarding a dependent, neglected or abused child." *Mullins v. Commonwealth*, 956 S.W. 2d 210 (Ky.1997), points out the privilege exists to preserve marital harmony, and is subject to exceptions, including KRS 620.050 where a child is involved. In *Carrier v. Commonwealth*, 142 S.W. 3d 670 (Ky.2004), a case involving KRE 507, the court held that the existence of a privilege is not a ground for failing to comply with the statute. The court appears to make a distinction between the simple fact of reporting and the disclosure of any other information.

**KRE 505: Religious privilege**

- a. **Definitions.** As used in this rule:
1. A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
  2. A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- b. **General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.
- c. **Who may claim the privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

**HISTORY:** 1992 c 324, § 10, 34, eff. 7-1-92; 1990 c 88, § 27

**DISCUSSION:**

Under subsection (a), communication does not have to be in the nature of confession or absolution. It is enough that is not intended for further disclosure except to other persons who might be necessary to accomplish the purpose. The privilege allows the person to refuse to disclose and to keep another person from disclosing this confidential communication made between the person and a clergyman (read as either bona fide minister or a person reasonably appearing to be a clergyman) "in his professional character as spiritual adviser." *Sanborn v. Commonwealth*, 892 S.W.2d 542 (Ky. 1994).

- a. If the person makes a statement in the course of seeking spiritual advice, counsel, or assistance, it falls under the privilege. The privilege may be claimed by the person making the communication, his guardian, his conservator, or his personal representative. The clergyman may claim the privilege, but only on behalf of the person making the statement.
- b. A member of the clergy who confronts a defendant with a victim's allegations is not acting as a spiritual advisor under the rules. *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky.2006)
- c. There are no exceptions to this privilege.

**KRE 506: Counselor-client privilege**

- a. **Definitions.** As used in this rule:
1. A "counselor" includes:
    - A. A certified school counselor who meets the requirements of the Kentucky Board of Education and who is duly appointed and regularly employed for the purpose of counseling in a public or private school of this state;
    - B. A sexual assault counselor, who is a person engaged in a rape crisis center, as defined in KRS Chapter 421, who has undergone forty (40) hours of training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault;

## NOTES

- C. A certified professional art therapist who is engaged to conduct art therapy pursuant to KRS 309.130 to 309.1399;
- D. A certified marriage and family therapist as defined in KRS 335.300 who is engaged to conduct marriage and family therapy pursuant to KRS 335.300 to 335.399;
- E. A certified professional counselor as defined in KRS 335.500;
- F. An individual who provides crisis response services as a member of the community crisis response team or local community crisis response team pursuant to KRS 36.250 to 36.270;
- G. A victim advocate as defined in KRS 421.570 except a victim advocate who is employed by a Commonwealth's attorney pursuant to KRS 15.760 or a county attorney pursuant to KRS 69.350; and
- H. A certified fee-based pastoral counselor as defined in KRS 335.600 who is engaged to conduct fee-based pastoral counseling pursuant to KRS 335.600 to 335.699.

2. A "client" is a person who consults or is interviewed or assisted by a counselor for the purpose of obtaining professional or crisis response services from the counselor.

3. A communication is "confidential" if it is not intended to be disclosed to third persons, except persons present to further the interest of the client in the consultation or interview, persons reasonably necessary for the transmission of the communication, or persons present during the communication at the direction of the counselor, including members of the client's family.

b. **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client, between himself, his counselor, and persons present at the direction of the counselor, including members of the client's family.

c. **Who may claim the privilege.** The privilege may be claimed by the client, his guardian or conservator, or the personal representative of a deceased client. The person who was the counselor (or that person's employer) may claim the privilege in the absence of the client, but only on behalf of the client.

d. **Exceptions.** There is no privilege under this rule for any relevant communication:

1. If the client is asserting his physical, mental, or emotional condition as an element of a claim or defense; or, after the client's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

2. If the judge finds:

A. That the substance of the communication is relevant to an essential issue in the case;

B. That there are no available alternate means to obtain the substantial equivalent of the communication; and

C. That the need for the information outweighs the interest protected by the privilege. The court may receive evidence in camera to make findings under this rule.

**HISTORY:** 2002 c 99, § 7, eff. 3-28-02; 2002 c 79, § 11, eff. 7-15-02; 1998 c 525, § 13, c 86, § 6, eff. 7-15-98; 1996 c 364, § 13, c 189, § 3, c 316, § 6, eff. 7-15-96; 1994 c 352, § 13, c 337, § 11, eff. 7-15-94; 1992 c 324, § 11, 34, eff. 7-1-92; 1990 c 88, § 28

#### DISCUSSION:

- a. This rule originally dealt with school counselors, sexual assault counselors, drug abuse counselors, and alcohol abuse counselors. Amendments have added certified professional art therapists, certified marriage and family therapists, members of certain crisis teams, certain (but not all) victim advocates, and fee-based pastoral counselors to the definition of "counselor."
- b. The rule provides that a person who consults or interviews the counselor for the purpose of obtaining "professional services" may refuse to disclose and prevent any other person from disclosing a confidential communication, that is, one not intended to be disclosed to third persons except persons who were present at the time to "further the interest of the client" in the consultation or interview. Typically, counselors work in group sessions and in the case of school counselors, probably need to have the parents present many times during the course of advising

## NOTES

and assisting students. Therefore, the privilege is written widely enough to cover all these situations.

- c. Under subsection (c) the client, his guardian, conservator or personal representative may claim the privilege. The counselor or the counselor's employer may claim the privilege on behalf of the client.
- d. This rule has more exceptions than the others. If the client asserts a physical, mental or emotional condition as an element of a claim or defense, the client cannot claim the privilege.
- e. If the client has died and if any party to the litigation raises the client's mental, physical or emotional condition, the privilege does not apply.
- f. In any case, if the judge finds the communication is relevant to an essential issue and there is no alternate means to obtain the "substantial equivalent" of the communication, and the need for information outweighs the interests protected by the privilege, then the privilege may be overcome. The rule provides that the court may receive evidence *in camera* to make findings under this rule. *Commonwealth v. Barroso*, 122 S.W. 3d 554 (Ky.2003).

### **KRE 507: Psychotherapist-patient privilege**

- a. **Definitions.** As used in this rule:

- 1. A "patient" is a person who, for the purpose of securing diagnosis or treatment of his or her mental condition, consults a psychotherapist.
- 2. A "psychotherapist" is:
  - A. A person licensed by the state of Kentucky, or by the laws of another state, to practice medicine, or reasonably believed by the patient to be licensed to practice medicine, while engaged in the diagnosis or treatment of a mental condition;
  - B. A person licensed or certified by the state of Kentucky, or by the laws of another state, as a psychologist, or a person reasonably believed by the patient to be a licensed or certified psychologist;
  - C. A licensed clinical social worker, licensed by the Kentucky Board of Social Work; or
  - D. A person licensed as a registered nurse or advanced registered nurse practitioner by the board of nursing and who practices psychiatric or mental health nursing.
- 3. A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are present during the communication at the direction of the psychotherapist, including members of the patient's family.
- 4. "Authorized representative" means a person empowered by the patient to assert the privilege granted by this rule and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this rule.

- b. **General rule of privilege.** A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.
- c. **Exceptions.** There is no privilege under this rule for any relevant communications under this rule:
  - 1. In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;
  - 2. If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or



3. If the patient is asserting the patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

**HISTORY:** 1996 c 369, § 18, eff. 7-15-96; 1994 c 367, § 13, eff. 7-15-94; 1992 c 324, § 12, 34, eff. 7-1-92; 1990 c 88, § 29

**DISCUSSION:**

- a. **When the privilege is the defendant's.** Any confidential communication as defined in subsection (a)(3) made to a psychotherapist as defined in subsection (a) is privileged, and the patient or his authorized representative may refuse to disclose and keep any other person from disclosing the confidential communication that was made for the purpose of diagnosis or treatment of mental condition. The 1994 Amendment expanded the definition of "psychotherapist" to include registered nurses and nurse practitioners. The privilege applies despite the presence of other persons who may be participating in the diagnosis or treatment. (Subsection (b)).
- b. **The psychotherapist may assert the privilege on behalf of the patient** as the patient's "authorized representative." Any authorized person who is privy to a communication may be an "authorized representative." In the absence of a formal appointment of a guardian or conservator, it appears that an appointed or retained attorney might fall under the definition of authorized representative.
- c. **The exceptions under the rule involve involuntary hospitalization proceedings** and statements made in interviews concerning competency or responsibility. By creating an issue of mental condition, the patient creates the need for evidence concerning it. In *Bishop v. Caudill*, 118 S.W. 3d 159 (Ky.2003), the court noted that the defendant has only a limited privilege for statements made in examinations. As noted in *Myers v. Commonwealth*, 87 S.W. 3d 243 (Ky.2002), a defendant's statements made during a court ordered examination could also be used as impeachment evidence to attack his credibility.
- d. **Also, if the patient is dead at the time of the proceeding**, if any party relies on the condition as an element or claim of a defense, the plain language of the rule excepts any communications that would have fallen under this rule from the rule of privilege.
- e. **In cases involving children.** Under KRS 620.050 (3) the psychotherapist-patient privilege does not apply to exclude evidence regarding dependent, neglected, or abused children "in any judicial proceedings resulting from a report pursuant to this section and ... in any criminal proceeding in District or Circuit Court regarding a dependent, neglected, or abused child." See *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008)(defendant's letter to his psychologist after being admitted to a psychiatric hospital where defendant described sexual contact with minor victim but blamed victim for the contact was admissible in prosecution for indecent exposure, sodomy, and sexual abuse.)
- f. **When the privilege belongs to the victim or a witness.** In *Commonwealth v. Barroso*, 122 S.W. 3d 554 (Ky.2003), the court held a witness's claim of privilege gives way to the defendant's Sixth Amendment compulsory process right. The court established a two part test which the defendant must overcome to gain access to the privileged material: 1. "The defendant must produce 'evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence;' and 2. The trial court must conduct an *in camera* review to determine whether or not the records sought actually do contain such evidence." *Id.* at 563-564. See *Dunn v. Commonwealth*, 360 S.W.3d 751 (Ky. 2012) as an example of a case where the defendant failed to meet first prong.
- g. **Ordinary medical records are different from psychotherapy records.** "Still there is no constitutional right to discover any records absent some showing why the materials sought might reasonably contain information helpful to one's defense." *Bennington v. Commonwealth*, 348 S.W.3d 613, 624 (Ky. 2011)
- h. One point that is often overlooked in mental health records cases is that the attorney for the Commonwealth is not the attorney for the prosecuting witness. KRS 15.725(1) and SCR 3.130(1.13) clearly state that the prosecutor represents the government in criminal prosecutions. In the initial stages, the matter of witness records should be limited to the judge and defense counsel in an *ex parte* proceeding. If the judge decides that the records cannot be used, the government has suffered no prejudice from being excluded from the review process. If the judge deems the

## NOTES

records admissible, the prosecutor will receive notice through reciprocal discovery, RCr 7.24(3)(A)(ii), and will be able to argue against their use in a pretrial *in limine* motion or when the witness is called. Defense counsel is entitled to prepare a case without input from the lawyer for the other side.

**KRE 508: Identity of informer.**

- a. **General rule of privilege.** The Commonwealth of Kentucky and its sister states and the United States have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.
- b. **Who may claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.
- c. **Exceptions:**
  - 1. Voluntary disclosure; informer as a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed by the holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state. Disclosure within a law enforcement agency or legislative committee for a proper purpose does not waive the privilege.
  - 2. Testimony on relevant issue. If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an in camera showing in support of the claim of privilege. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavits. If the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to disclose this identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following:
    - A. Requiring the prosecuting attorney to comply;
    - B. Granting the defendant additional time or a continuance;
    - C. Relieving the defendant from making disclosures otherwise required of him;
    - D. Prohibiting the prosecuting attorney from introducing specified evidence; and
    - E. Dismissing charges.
- d. In civil cases, the court may make any order the interests of justice require if the informer has pertinent information. Evidence presented to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity.

**HISTORY:** 1992 c 324, § 13, 34, eff. 7-1-92; 1990 c 88, § 30

**DISCUSSION:**

The Government (Kentucky, United States or any other state) may refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of law or who has assisted in that investigation. This rule applies where the information was given to a law enforcement officer or a member of a legislative committee or its staff conducting an investigation.

- a. **Privilege applies in civil and criminal cases. KRE 101; 1101.** Subsection (b) authorizes the "appropriate representative of the public entity to which the information was furnished" to invoke the privilege. Thus, in Kentucky prosecutions involving the FBI or the DEA, the federal agents may invoke the rule regardless of the desires of the Commonwealth's Attorney. After this point, however, the rule is rather unclear as to exactly what the phrase "public entity" means. A state police trooper is employed by the Commonwealth directly. If the Commonwealth is considered to be the "public entity," the County or Commonwealth's attorney, the government's lawyer in criminal cases, should be able to invoke or waive the privilege. But if the "public entity" is the Kentucky State Police, some representative of that organization would be the only person authorized to invoke or waive the privilege.

## NOTES

- b. **What can the government refuse to disclose?** The identity of the informant and answers to questions that would lead to the identity of the informant. *Thompkins v. Commonwealth*, 54 S.W. 3d 147 (Ky.2001). Also, the Commonwealth can condition its plea offer on the defendant waiving his right to learn the informant's identity. *See Porter v. Commonwealth*, 2011WL6542998, ---S.W.3d--- (Ky. 2011). *Caveat*: Porter's attorney knew the informant's identity but was not allowed to inform defendant.
- c. **Mere tipster.** Relying on *Roviaro v. United States*, 353 U.S. 53 (1957), Kentucky holds that a "mere tipster" need not be disclosed. *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky.1998). The "tipster" in *Taylor* was not present when the charged crime was committed. It was mere speculation that the informant could have provided any testimony about what occurred. *See also Robbins v. Commonwealth*, 336 S.W.3d 60 (Ky. 2011).
- d. Often, the defendant will have some idea that an informant may be able to give testimony that would be helpful and in these situations, if the Commonwealth invokes the privilege, the trial court must conduct an *in camera* hearing to allow the Commonwealth to support its claim of privilege.
- e. If the informant possesses exculpatory evidence, the federal constitution requires the Commonwealth to disclose enough information about the informant and his information to prepare a defense. *United States v. Bagley*, 473 U.S. 667 (1985). This rule only applies to other situations. The proof may be in the form that the court desires.
- f. If the court finds that there is a "reasonable probability" that the informant can give relevant testimony, then the Commonwealth must decide whether or not to disclose identity voluntarily.
- g. If the Commonwealth does not disclose in a criminal case, the defendant may move for an order requiring disclosure, or the court may enter one on its own motion. If the Commonwealth does not comply, the judge has a number of options, culminating in an order of dismissal. Obviously, dismissal is not going to be the first thing a judge thinks of. The options listed in subsection (c)(2) are not the only options available to a judge.

**KRE 509: Waiver of privilege by voluntary disclosure**

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged. Disclosure of communications for the purpose of receiving third-party payment for professional services does not waive any privilege with respect to such communications.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 31

**DISCUSSION:**

If a party voluntarily gives up a significant part of privileged matter, there is not much reason to keep the other side from learning the rest of it. *St. Clair v. Commonwealth*, 140 S.W. 3d 510 (Ky. 2004). This is an example of the rule of completeness that permeates evidence law. However, KRE 509 is cast in terms of waiver, and compelled disclosures or disclosures made *in camera* as authorized by law do not result in waiver. See KRE 510.

**KRE 510: Privileged matter disclosed under compulsion or without opportunity to claim privilege**

A claim of privilege is not defeated by a disclosure which was:

1. Compelled erroneously; or
2. Made without opportunity to claim the privilege.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 32

**DISCUSSION:**

This rule provides that a claim of privilege is not lost forever if a judge erroneously compels disclosure of confidential information or the disclosure was made without an opportunity to claim the privilege. In *Commonwealth v. Barroso*, 122 S.W. 3d 554 (Ky. 2003), the circuit judge ordered the prosecuting witness to testify about her mental health history during a hearing on the issue of disclosure of records. Under

## NOTES

these circumstance, the court held, the witness's claim of privilege was not defeated. *See also Peak v. Commonwealth*, 197 S.W.3d 536 (Ky. 2006).

**KRE 511: Comment upon or inference from claim of privilege; instruction**

- a. **Comment or inference not permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
- b. **Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the assertion of claims of privilege without the knowledge of the jury.
- c. **Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

**DISCUSSION:**

- a. Both the judge and the attorneys who know a claim of privilege is likely to be made must ensure the jury does not learn of it.
- b. Subsection (a) makes clear that no one may make a comment about a lawfully invoked privilege. On this matter, the prosecutor, by virtue of her office, is under a strict obligation not to comment on silence. *Niemeyer v. Commonwealth*, 533 S.W. 2d 218 (Ky.1976). No inference concerning any issue may be drawn from it. This part applies to juries, and to judges making rulings on motions for directed verdict.
- c. The seminal Kentucky case addressing a defendant's Fifth Amendment right to remain silent is *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky. 2006). There the Court held "[a] comment violates a defendant's constitutional privilege against compulsory self-incrimination only when it was manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon the defendant's failure to testify ..., or invited the jury to draw an adverse inference of guilt from that failure." *Id.* at 589-590.
- d. Subsection (c) entitles any party, upon request, to an instruction that no inference may be drawn from a claim of privilege.

## Article VI. Witnesses

## NOTES

### Rule 601: Competency

- a. General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
- b. Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
  1. Lacked the capacity to perceive accurately the matters about which he proposes to testify;
  2. Lacks the capacity to recollect facts;
  3. Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
  4. Lacks the capacity to understand the obligation of a witness to tell the truth.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 34

#### **DISCUSSION:**

Under KRE 601(a) every person is legally competent to serve as a witness unless some other law declares otherwise. KRE 601 presumes witnesses competent and authorizes disqualification only upon proof of incompetency. *Price v. Com.*, 31 S. W. 3d 885 (Ky.2000). Rules 605 and 606 declare the trial judge and the jury incompetent, but only re: the trial where they are performing these functions. *Marrs v. Kelly*, 95 S. W. 3d 856 (Ky. 2003). KRE 601(b) prescribes the minimum abilities a witness must possess in order to “testify as a witness.” The determination of competency is left to the discretion of the trial judge at a hearing outside the presence of the jury. *Jarvis v. Com.*, 960 S.W.2d 466, 468 (Ky.1998).

- a. **Capacity is mandatory.** If a judge determines under KRE 601(b) that a person lacks capacity to testify, the judge must disqualify that person from testifying. It is not a matter of discretion; a person lacking capacity *is disqualified*. The only judicial discretion is in determining capacity, and that is reviewed under the usual deferential standard. If the witness demonstrates marginal capacity, the judge must perform balancing under KRE 401-403. KRE 601 is used to exclude witnesses “grudgingly,” reaching only “incapable” witnesses rather than merely “incredible” witnesses. *Price v. Com.*, 31 S. W. 3d 885 (Ky. 2000). If you fail to disqualify a witness entirely, you can still present a competency expert at trial, to impeach the witness’s credibility.
- b. **Child witnesses** are presumed competent to testify under KRE 601(a). There is no minimum age. *Harp v. Com.*, 266 S.W.3d 813, 823 (Ky. 2008), citing, *Pendleton v. Com.*, 83 S. W. 3d 522 (Ky.2002); cf., *B.B. v. Com.*, 226 S.W.3d 47 (Ky.2007) (four-year-old child incompetent to testify, based on responses at hearing). A judge cannot exclude a child's testimony without conducting a preliminary examination to determine competency. *Coleman v. Coleman*, 323 S.W.3d 770, 772 (Ky. App. 2010) (remanded).
- c. **The competency bar is low**, depending on the child’s level of development and the subject matter. *Pendleton v. Com.*, 83 S. W. 3d 522 (Ky.2002). The colloquy required to adjudge whether a child witness is competent can be brief. *Swan v. Com.*, 384 S.W.3d 77, 97 (Ky. 2012) (approving bare minimum questions to determine child understood requirement to tell the truth; child’s capacity to perceive matters accurately and recollect facts were shown by the child's testimony about the events, which tracked that of the other witnesses; child had capacity to express himself so as to be understood, as his responses, while short, demonstrated).
- d. **When there are “serious questions** about [a child witness’s] thought processes, clarity and motivations” the trial court must allow an independent psychological evaluation and -- if said evaluation raises questions-- a competency hearing. An independent evaluation can provide “relevant and beneficial evidence that would aid a jury in gauging the reliability” of the child’s “memory, taking into consideration his psychological condition and medication.” *Perry v. Com.*, 390 S.W.3d 122, 128 (Ky. 2012) (reversing and remanding for further proceedings). Interviewing techniques may affect whether a child is reporting from memory or reacting to cues and hints by the interviewer. See, *dissent in Pendleton*; see also, *B.B. v. Com.*, 226 S.W.3d 47, above, finding a four-year-old incompetent. *Harp v. Com.*, 266 S.W.3d 813, 823 (Ky. 2008) (fact that child witness indicated when she was unable to recall a fact or event was “important” support for her competency). See also drunk, insane (h), below.

## NOTES

- e. **Closed circuit tv, Skype, and confrontation.** KRS 421.350 allows remote testimony by closed circuit t.v. for a child victim twelve or younger when the crime was committed even if the child is older than twelve at the time of trial. *Danner v. Com.*, 963 S.W.2d 632 (Ky.1998). The trial court must find a “compelling need” to utilize remote testimony in order to meet the requirements of KRS 421.350. Unless those criteria are met, in any proceeding where confrontation rights apply, there is no authority for permitting remote or “Skype” testimony without an agreement of both parties. *Gentry v. Deuth*, 381 F. Supp. 2d 630 (W.D. Ky. 2004) (holding that unless the testimony is offered to serve an important interest like protecting a child witness, remote testimony violates the defendant’s right to confrontation). Compelling need requires a “substantial probability that the child would be unable to reasonably communicate” due to the presence of defendant.” KRS 421.350(5). On appeal, the trial court’s determination under KRS 421.350 will not be disturbed absent an abuse of discretion. *Danner*, 963 S.W.2d 632.
- f. **Defendants** have a constitutional right to testify [regardless of competence]. To federalize this issue, cite *Rock v. Arkansas*, 483 U.S. 44 (1987) (The Fourteenth Amendment’s due process clause, the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to compulsory process); *Riley v. Com.*, 91 S. W. 3d 560 (Ky.2002) (citing *Rock*, and Ky. Const. §11). A defendant in a criminal case is a competent witness because KRE 601(a) and KRS 421.225 make him so. Under 421.225 the defendant testifies only at his own request.
- g. **Failure to raise competency issues** generally does not preclude collateral review, because the defendant’s alleged incompetence may invalidate his apparent waiver. *Dean v. Com.*, 2006 WL 3691134 (Ky. App. 2006) (Unreported), citing *Silverstein v. Henderson*, 706 F.2d 361 (2nd Cir.1983).
- h. **Drunk, insane, brain-damaged, immature or otherwise mentally incompetent** witnesses (either at the time of the incident or at the time of testifying) may or may not be disqualified. The judge must determine whether the witness so lacked capacity to perceive or to remember that no juror could rely on what he had to say.
- i. **Expert psychological exam and competency hearing.** Ask for these. If the witness is not disqualified, you can still put on the expert to impeach the witness’s competency. *Owen v. Com.*, 181 Ky. 257, 204 S.W. 162, 164 (Ky. 1918) (expert testified that the witness Sims was “practically an idiot” and “incapable of comprehending the import of an oath”).
- j. **Hearsay.** The person whose statement was overheard must be competent in addition to the witness conveying the hearsay. The declarant is the real witness, and the person testifying about the declarant’s out of court statements merely a conduit. In *B.B. v. Com.*, 226 S.W.3d 47, 51 (Ky. 2007) hearsay was inadmissible where the declarant, a three-and-a-half-year-old child, was testimonially incompetent. The rule is different in federal court under *Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir. 1988) (excited utterance by a child, even if child was incompetent did not necessarily preclude introduction of that person’s hearsay statements). But the federal rule lacks KRE 601’s subsection (b), which plainly lists who may be disqualified. This is a critical difference.
- k. **Warning:** Not all out-of-court statements by incompetent declarants are inadmissible. In *B.B.*, the Court adopted Professor Lawson’s view that a declarant’s incompetence is merely a relevant consideration in determining whether to admit hearsay. *Id.* (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.60[5], at 675 n. 53 (4th ed.2003)). According to Lawson the reason for the testimonial incompetence of a declarant is important:  
  

In [citation omitted], the declarant lacked the capacity to communicate in the courtroom (understanding questions and being able to formulate answers), a basis for testimonial incompetence that raises no questions about reliability of the hearsay. In a different situation, the declarant might be incompetent to testify for lack of capacity to accurately perceive complex events. In this latter situation, the incompetence would extend as well to the hearsay and should be an obstacle to its admission.

Lawson, *supra*, § 8.60[5], at 675 n. 53 (emphasis added). Under Lawson’s analysis an out-of-court statement is inadmissible only if the reason for the hearsay declarant’s testimonial incompetence undermines the reliability of the declarant’s hearsay statement.
- l. **Hypnosis.** A witness who has undergone hypnosis may be disqualified under the totality of circumstances test. *Roark v. Com.*, 90 S. W. 3d 24 (Ky.2002). Considerations are whether the hypnosis was part of the investigation, whether there was a pre-hypnosis description, whether

## NOTES

the hypnotist was a “forensic” hypnotist and whether the session was recorded. No single consideration is determinative, and the list is not exhaustive.

- m. **Jailhouse informants or snitches** are not incompetent to testify under KRE 601. *West v. Com.*, 161 S.W.3d 331 (Ky.App. 2004) (refusing to impose stricter scrutiny).
- n. **Judges and jurors** may only testify under certain very limited conditions. See KRE 605 and KRE 606, respectively.
- o. **Lawyers** are competent witnesses for any purpose. But a lawyer who is called as a “necessary” witness is bound by SCR 3.130(3.7)(a) to disqualify as counsel, and by SCR 3.130(1.6) and KRE 503 to maintain confidentiality of any information gained thru representation. *Caldwell v. Com.*, 133 S. W. 3d 445 (Ky.2004).
- p. **Standard and burden of proof.** To disqualify a witness, a party must demonstrate that the witness (1) was unable to perceive accurately the matters about which he proposes to testify, (2) presently lacks the ability to recall these facts, (3) cannot, in some meaningful way, communicate these facts to the jury, or (4) does not understand the obligation to tell the truth. The burden is on the person seeking to disqualify the witness. *Burton v. Com.*, 300 S.W.3d 126, 142 (Ky. 2009) (defense chose not to cross-examine witness who had difficulty communicating nor present any evidence to rebut his competency to testify).

### **Rule 602: Lack of personal knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This rule is subject to the provisions of KRE 703, relating to opinion testimony by expert witnesses.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 35

#### **DISCUSSION:**

- a. **Failure to object.** If the adverse party does not object, the jury and the prosecutor may use testimony lacking a basis in personal knowledge for any purpose. *Perdue v. Com.*, 916 S.W.2d 148, 157 (Ky.1995); *cf.*, *s Alford v. Com.*, 338 S.W.3d 240 (Ky. 2011) (reversing due to unpreserved hearsay that bolstered a child sex victim).
- b. **Foundation.** It is good practice to establish the basis for the witness’s personal knowledge before the witness testifies, even though the rule does not require it. Generally opposing counsel must object to force establishment of personal knowledge. The judge has no duty to intervene simply because foundation is not shown. But under KRE 611(a) the judge may intervene to ask the lawyer to establish the basis. Under KRE 614(b) the judge can ask the foundation questions personally. Under the second sentence of KRE 602 formal foundation through testimony is not required. If a store video shows the witness looking at the robber, that’s enough. *Cf.*, KRE 703(a) allows an expert witness to rely on hearsay, etc.
- c. **Hypnotically refreshed testimony** of a witness can be admitted under a totality of circumstances analysis. *Roark v. Com.*, 90 S. W. 3d 24 (Ky.2002). The danger with such testimony is the potential for suggestion to supplant the memory of the witness. See comments in KRE 601.
- d. **Judge’s role.** The judge determines personal knowledge as a preliminary KRE 104(b) question, that is, by asking whether the jury reasonably could believe the offered facts (*i.e.*, presence at the event) making personal knowledge possible. Credibility plays no part in this, or any other, KRE 104 determination. The question is whether there is testimony or evidence establishing the predicate facts to allow the jury to make a rational inference of personal knowledge.
- e. **Lay opinion** offered under KRE 701 is constrained by KRE 602, which limits lay opinion to matters of which the witness has personal knowledge. *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009). “Speculation by a lay witness is not helpful to the jury ...” *Mondie v. Commonwealth*, 158 S.W.3d 203, 212 (Ky. 2005). See also Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 6.05[3], at 405 (4th ed. LexisNexis 2003).
- f. **Personal knowledge, defined.** KRE 602 requires witnesses who have heard, seen, smelled, felt, or tasted –*i.e.*, used their five senses to gain information. Even in hearsay cases, a witness must show first-hand knowledge of the out-of-court statement. Witnesses “may not testify to a matter

## NOTES

unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” *Rossi v. CSX Transp., Inc.*, 357 S.W.3d 510, 515 (Ky. App. 2010). This foundation need not formally be laid before the witness testifies, unless the opponent objects. See also *Mullikan v. Com.*, 341 S.W.3d 99, 108 (Ky. 2011) (witness was incompetent to testify to hearsay information acquired from police reports and other witnesses due to lack of first-hand information).

**Rule 603: Oath or affirmation**

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 36

**DISCUSSION:**

- a. **Constitution requires options.** Section 5 of the Kentucky Constitution prohibits diminution of rights on the basis of religious belief or unbelief. To accommodate this mandate, KRE 603 allows a witness to promise to testify truthfully either by oath or affirmation. In some courts the judge ends the oath with the phrase “so help you God.” However, the witness has a constitutional right not to reference God. To avoid embarrassing the witness and potentially prejudicing the party calling the witness, judges should inquire how that witness wishes to comply with the rule or ask each witness to swear or affirm without further embellishment. See also KRE 613, 801A and 804, and KRS 523.020(1), which provide remedies for untruthful testimony (perjury).
- b. **Informal hearings** without swearing witnesses violate KRE 603 oath and affirmation requirement. *Kelsay v. Richards*, 2012 WL 1957424 (Ky. App. 2012) (Unreported) (child custody hearing conducted at bench without swearing witnesses). See also KRE 103(e).
- c. **Leading questions.** Lawyers are prohibited under KRE 603 from using leading questions containing unsworn assertions as to the content of prior conversations with a witness. *Holt v. Com.*, 219 S.W.3d 731 (Ky. 2007) (reversing and remanding). The practice makes a witness of the attorney, allows the lawyer’s credibility to be substituted for that of the witness, and violates both hearsay and the KRE 603 “oath and affirmation” rule. *Id.*

**Rule 604: Interpreters**

An interpreter is subject to the provisions of these rules relating to qualifications of an expert and the administration of an oath or affirmation to make a true translation.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 37

**DISCUSSION:**

KRE 601(b) requires the ability to communicate with the jury either directly or through an interpreter. KRE 604 requires a person wishing to appear as an interpreter to qualify as an expert, by training, experience or education, and to take an oath.

If the interpreter appointed is unqualified, a defendant is not effectively “present for trial” as provided by RCr 8.28(1). Under the Administrative Procedures, AP IX, Sec. 3, Interpreters are required to be familiar with KRE 604 and swear affirmatively to the following:

Do you solemnly swear or affirm you have the knowledge, skills, experience, and/or education to interpret this proceeding, and you will interpret accurately, completely and impartially, using your best skill and judgment in accordance with the standards prescribed by law, any Code of Ethics under which you have been certified, and the Code of Professional Responsibility for Interpreters, and will make a true translation pursuant to KRE 604.

Administrative Procedures, AP IX, Sec. 3, Oath, Amended by Order 2011-03, eff. 3-15-11.

- a. **Attorney-client relations.** An interpreter may be employed for any and all meetings and conferences between client and attorney. KRS 30A.425. Attorney-client conversations that are interpreted are privileged by KRE 503(a)(2)(B). The interpreter is considered the representative of the client. KRS 30A.430 prohibits examination of interpreters concerning privileged conversations without the consent of the client. The interpreter cannot be required to testify to



## NOTES

any other privileged communication (e.g., religious privilege) without the permission of the client. Article 5, Kentucky Constitution.

- b. **In Custody.** Determinations whether a defendant is “in custody” for purposes of requiring a *Miranda* warning should include consideration of the defendant’s fluency in English. *Alkabala-Sanchez v. Com.*, 255 S.W.3d 916, 923 (Ky. 2008) (Justice Minton dissent concluding that because of all of the relevant circumstances including the language barrier between Appellant and the officers, he was in custody from the beginning of his interview with the police.)
- c. **Difficulty speaking English** does not require an interpreter. The Commonwealth is required to show by a preponderance that a waiver under *Miranda v. Arizona*, 384 U.S. 436 (1966) and confession are voluntary based on the accused's age, education, intelligence, and linguistic ability. *Bailey v. Com.*, 194 S.W.3d 296, 300 (Ky.2006). “Better practice likely would have been for the authorities to have used the services of an interpreter....”. *Juarez v. Com.*, 2008 WL 2167887 (Ky. 2008) (Unreported) (defendant’s fluency in English was disputed, but colloquy between defendant and authorities was readily capable of being understood without aid of translator).
- d. **Lengthy interpretation.** For an interpretation of two or more hours without breaks, a team of two interpreters should be appointed. *Section 6* of Amended Order 2004-3. Interpreters must be Qualified Level I interpreters pursuant to Rule of Administrative Procedure, Part IX, Section 8.
- e. **Miranda rights** can be waived by non-English speaking defendants when a qualified **interpreter** is not available. *Rivera-Reyes v. Com.*, 2006 WL 2986495 (Ky. 2006) (Unreported) (holding rights waiver sufficient when non-English-speaking defendant was given a Spanish version of the *Miranda rights* waiver form, placed his initials beside each of the four enumerated provisions on the waiver form and signed his name at the bottom). The Court in *Rivera-Reyes* (with Justices McAnulty and Minton dissenting) distinguished a contrary result in *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo.2004) by the fact that Aguilar-Ramos requested an attorney and Rivera-Reyes indicated he understood his rights. *Cf.*, *United States v. Castorena-Jaime*, 117 F.Supp.2d 1161, 1171 (D. Kansas 2000) (language barriers may impair a suspect's ability to act knowingly and intelligently); *People v. Mejia-Mendoza*, 965 P.2d 777 (Colo.1998) (translator merely read, in Spanish, a Miranda warning card, which was printed in English, to which the defendant never responded).
- f. **Miranda card, Spanish.** The Spanish version of the *Miranda* form used in Kentucky does not contain the fifth element found on the English form, which advises a defendant that he can stop an interrogation at any time by requesting an attorney. The Kentucky Supreme Court held that although “regrettable,” this omission “did not deprive Appellant of the full benefit of his Constitutional rights.” *Rivera-Reyes v. Com.*, 2006 WL 2986495 (Ky. 2006) (Unreported).
- g. **Oath.** Failure to place interpreter under oath was not palpable error in murder prosecution; testimony of witness speaking through translator mirrored that of another witness and did not prejudice defendant due to his partial confession, etc.). *McNeil v. Com.*, 2010 WL 1005911 (Ky. 2010) (Unreported).
- h. **Paraphrasing not allowed.** Interpreters should not paraphrase witnesses or ask clarifying questions of witnesses in violation of Canon 1 of the Code of Professional Responsibility for Interpreters. Counsel should also object when the interpreter fails to provide simultaneous interpretation, or does not interpret at all.
- i. **Qualifying** to appear in court. An interpreter qualifies by complying with administrative standards prescribed by the Supreme Court, and demonstrating ability to interpret “effectively, accurately, and impartially.” KRS 30A.405(1) and (2); and the Rules of Administrative Procedure, Part IX (Procedures for Appointment of Interpreters), as amended.
- j. **Statements to police** without a qualified interpreter present are equally suspect.
- k. **Unofficial interpreter, use of.** Any error in allowing jury to hear police officer's translation of defendant's statement instead of a court interpreter’s translation was harmless. There was no assertion that any of the translation was incorrect, and in the statement the defendant denied all involvement in the shooting. *Arevalo v. Com.*, 2008 WL 5051611 (Ky. 2008) (Unreported). The police officer's lack of proficiency in Spanish did not render waiver invalid when defendant’s voluntary, knowing and intelligent waiver was clearly set forth on the Spanish version of the *Miranda rights* waiver form. *Rivera-Reyes v. Com.*, 2006 WL 2986495 (Ky. 2006) (Unreported).

## NOTES

- I. **Vienna Convention violations.** Suppression of evidence is not an available remedy for violations of Article 36 of the Vienna Convention (which requires the police to inform a defendant of his right to contact the Mexican Consulate). *Rivera-Reyes v. Com.*, 2006 WL 2986495 (Ky. 2006) (Unreported).

**Rule 605: Competency of judge as witness**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 38

**DISCUSSION:**

A judge is more than an umpire for resolving evidentiary disputes. KRE 611(a) makes judges ultimately responsible for the quality of the evidence heard by the jury, and for ensuring that the evidence is effective for the ascertainment of the truth. But a judge might overhear the defendant threaten the life of a witness, or overhear the victim tell the prosecutor he really can't say the defendant is the one who robbed him. Such evidence-- if adduced through the presiding judge--would be nearly unimpeachable. Cross-examination would be so difficult and so unlikely to counteract the judge's testimony that the drafters decided the presiding judge's testimony cannot be allowed.

- a. **Character witness.** A judge is forbidden by SCR 4.300(2) to testify voluntarily as a character witness and is prohibited from lending the prestige of his office to advance the private interests of private parties.
- b. **Judicial notice (versus judicial testimony).** Trial courts may take judicial notice of court records. *Adkins v. Adkins*, 574 S.W.2d 898 (Ky.App.1978). But a trial court's observations about the circumstances of separate proceedings violate KRE 605 because they implicate the trial judge as a witness. *Whitlock v. Haney*, 2012 WL 163024 (Ky. App. 2012)(Unreported).
- c. **Predecessor judge.** A judge may testify in a "subsequent and separate proceeding" of that case, such as an RCr 11.42 proceeding. *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky.1998); *Lawson Kentucky Evidence Law Handbook*, 3d Ed.1993 at 151.
- d. **Presiding judge.** A judge may not testify in a case where he or she is presiding. KRE 605 prevents judges from testifying at trials where they are presiding. *Marrs v. Kelly*, 95 S. W. 3d 856 (Ky.2003). Canon 5 of SCR 4.300, Code of Judicial Conduct, as well as KRE 605. The second sentence of KRE 605 makes an objection unnecessary.
- e. **Recused judge.** In *Bye v. Mattingly*, 975 S.W.2d 459 (Ky. App. 1996), a judge who had recused himself appeared as a character witness in a will case. The court recognized the potential for prejudice but declined to disturb the trial judge's balancing under KRE 403.
- f. **Reversible error.** Even if the presiding judge testifies, the rule language does not expressly require reversal. KRE 103(a) precludes reversal except upon showing that the error affected a substantial right of a party. Appellate courts should presume that any testimony by a presiding judge is reversible. The moral position of the presiding judge makes anything he says too prejudicial to the party against whom the testimony is introduced.
- g. **Testimony – only—is precluded.** The presiding judge is bound by KRE 501(2) and (3) to disclose and to produce tangible items.

**Rule 606: Competency of juror as witness**

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 39

**DISCUSSION:**

A juror may not testify as a witness at a trial where the juror is also sworn to be the finder of fact. The considerations underlying KRE 605 also underlie this rule.

- a. **Appearance of evil exception.** A clearly wrongful act may create an exception to the rule that a jury cannot impeach its own verdict. *Young v. State Farm Mutual Automobile Insurance Co.*, 975 S.W.2d 98, 99-100 (Ky.1998) (patently improper conduct of the bailiff warranted application of

## NOTES

the “appearance of evil” exception to allow a jury to impeach its own verdict); *Dillard v. Ackerman*, 668 S.W.2d 560, 562-63 (Ky.App.1984) (appellate court would be helpless to redress the wrong without “appearance of evil” principle).

- b. **Blanket prohibition.** RCr 10.04 goes farther than KRE 606 and prohibits examination of a juror, period, except to establish that the verdict was decided “by lot.” Under RCr 10.04, “evidence of another juror as to anything that occurred in the jury room” is incompetent to impeach the jury’s verdict. *Hicks v. Com.*, 670 S.W.2d 837, 839 (Ky.1984).
- c. **Grand jurors are not prohibited** by KRE 606 from testifying as to the proceedings by which an indictment was returned. But RCr 5.24(1) enjoins secrecy on all participants of a grand jury proceeding “subject to the authority of the court at any time to direct otherwise.” A party cannot subpoena a grand juror and rely on KRE 501 (no one may refuse to be a witness) to force a grand juror to testify. The party must first apply to the grand jury presiding judge, the chief judge of the circuit, or the judge presiding over the action to obtain grand juror testimony.
- d. **Grand jury witnesses may not be prohibited from testifying.** In *Purcell v. Com.*, 149 S. W. 3d 382 (Ky.2004), *overruled on other grounds by Com. v. Prater*, 324 S.W.3d 393, 398 (Ky. 2010) the prosecutor played the defendant’s grand jury testimony during the government’s case in chief. While the statement qualified as a party admission under KRE 801A, the opinion is silent as to how the secrecy barrier of RCr 5.24(1) was avoided. Perhaps the prosecutor applied to the grand jury judge for permission to use the statement.
- e. **Intoxicants.** Under FRE 606 a juror cannot testify about another juror’s use of wine, marijuana, cocaine, and beer on breaks during the trial since these are not “outside influences” on jurors within the rule. *Tanner v. U.S.*, 483 U.S. 107 (1987), on remand 845 F.2d 266.
- f. **Outside influences.** Courts will consider juror testimony concerning overt acts of misconduct by which truly extraneous and potentially prejudicial information was presented to the jury. *Bowling v. Com.*, 168 S.W.3d 2, 9 (Ky. 2004); *U.S. v. Gonzales*, 227 F.3d 520, 524 (6<sup>th</sup> Cir. 2000) (A juror is incompetent to impeach his or her verdict, except as to extraneous prejudicial information or outside influence); see also, *Mattox v. United States*, 146 U.S. 140, 148 (1892); *Doan v. Brigano*, 237 F.3d 722, 732 (6<sup>th</sup> Cir.2001), *abrogated on other grounds as recognized by Maples v. Stegall*, 340 F.3d 433 (6<sup>th</sup> Cir.2003) (declaring an Ohio rule similar to RCr 10.04 unconstitutional); see also, *Com. v. Wood*, 230 S.W.3d 331 (Ky.App. 2007) (jury’s use of a dictionary was an “overt act” about which a court could receive testimony in order to ensure a fair trial).

### **Rule 607: Who may impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 40

#### **DISCUSSION:**

Prior to 1953, impeaching one’s own witness was prohibited. After 1953, it was allowed under CR 43.07 by any means except evidence of particular wrongful acts. CR 43.07 was abrogated by the Supreme Court as of January 1, 2005. Since then, KRE 607 authorizes impeachment of any witness by any party by any method authorized by law.

- a. **Bias-interest-prejudice** - KRE 104(e) states that it does not limit evidence relevant to “bias, interest, or prejudice.” KRE 607 allows evidence that the witness has a grudge or a reason to hold a grudge, that the witness has something to gain or a bad result to avoid, or that for personal reasons the witness is not being square with the jury. This is never a collateral issue. *Miller v. Marymount Medical Center*, 125 S. W. 3d 281 (Ky.2003); *Motorists Mutual Ins. Co. v. Glass*, 996 S.W.2d 437, 447 (Ky.1997); *Weaver v. Com.*, 955 S.W.2d 722, 725 (Ky.1997); *Com. v. Maddox*, 955 S.W.2d 718, 720-721 (Ky.1997).
- b. **Character for untruthfulness** - By the methods permitted in KRE 608, a party may demonstrate that no one else believes the witness, supporting the inference that the jury should not believe the witness either.
- c. **Collateral issue.** A trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue if that issue is raised by a party on direct examination. *Com. v. Prater*, 324

## NOTES

- S.W.3d 393 (Ky. 2010). Cross-examination on collateral matters is subject to exclusion based on KRE 403 balancing. *Davenport v. Com.*, 177 S.W.3d 763, 772 (Ky. 2005).
- d. **Competency** of the witness. Nothing in Article 6 prohibits presentation of evidence attacking a witness's competency to testify as a witness, whether that incompetency is based on lack of ability to perceive the events, or some other defect. A psychologist who examined the witness for competency may testify.
  - e. **Confrontation.** Limitation on impeachment impinges on the fundamental right of confrontation. *Caudill v. Com.*, 120 S. W. 3d 635 (Ky.2003). Judges should err on the side of allowing impeachment. The judge may limit impeachment only as long as the jury gets a "reasonably complete" picture of the witness' interest, bias and motivation. *Com. v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997) A party should be given greater latitude in impeachment of a non-party witness. *Id.*
  - f. **Contradiction** - Evidence introduced through other witnesses may establish that while the witness testified A, B, and C, all other witnesses agree that what really happened was D, E, and F. Circumstantial evidence of the witness's ability to perceive or recall may also be used to impeach under this heading.
  - g. **Credibility** may be impeached in many ways: under KRE 104(e) (evidence of bias, interest, or prejudice), KRE 608 (character evidence), KRE 609 (prior convictions), KRE 613 (prior statements by the witness), KRE 801A (prior inconsistent statements) or case law. A "witness may be impeached by the use of *any evidence relevant to testimonial credibility*." R. Lawson, *Kentucky Evidence Law Handbook*, § 4.00(A) (2d. ed.1984) (emphasis added). A witness may be impeached by introducing evidence of bias, interest, or hostility, prior inconsistent statements, character evidence, and criminal convictions. Lawson, §§ 4.10, 4.15[2], 4.20, 4.25 (4th ed.2003).
  - h. **Defendant testifying.** A defendant testifying at trial is subject to the same impeachment as any other witness. *Caudill v. Com.*, 120 S. W. 3d 635 (Ky. 2003).
  - i. **Inconsistent statements** - KRE 801A(a)(1) states that a prior inconsistent statement of a witness is admissible as long as the defendant has an opportunity to cross-examine the witness at trial regarding the prior statement and a proper foundation is laid. See also KRE 613. Prior inconsistent statements can be admitted not just to impeach witnesses, but also as substantive evidence. *Manning v. Com.*, 23 S.W.3d 610, 613 (Ky.2000). If inconsistent statements are introduced for impeachment only (a rare occurrence), a limiting instruction is required.
  - j. **Motive to lie.** Evidence of interracial sexual relations offered to show a reason to lie has been upheld. *Olden v. Kentucky*, 488 U.S. 227 (1988) (reversing a decision to exclude). KRE 403 and 611(a) give a judge discretion to limit the extent of relevant cross- examination and production of relevant evidence. But the 6th Amendment of the U.S. Constitution gives the defendant a right to confront witnesses, present a defense, and undermine evidence presented against him. *Com. v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997).
  - k. **One's own witness.** Impeachment of one's own witness is allowed even before the other side has a chance to do so. The credibility of any witness may be attacked by any party. For example, the witness's prior conviction might be elicited by the proponent to create "not-hiding-anything" rapport with the jury.
  - l. **Prior convictions** - Proof of a prior felony conviction allows an inference that the witness cannot be trusted. KRE 609.
  - m. **Rehabilitation of witness.** The proponent cannot rehabilitate a witness in advance. "Bolstering" evidence is irrelevant until the adverse party makes an attack on the witness. *Samples v. Com.*, 983 S.W.2d 151, 154 (Ky.1998), *overruled on other grounds by Lawson v. Com.*, 53 S.W.3d 534 (Ky. 2001). The fact that a witness said the same thing out of court and in court is equally irrelevant. See Rule 801A.
  - n. **Supposed impeachment.** A party cannot use supposed impeachment to introduce otherwise inadmissible evidence. *Com. v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997); *Slaven v. Com.*, 962 S.W.2d 845, 858 (Ky.1997). Kentucky has stopped short of adopting the federal "primary purpose test," but will not stand for subterfuge in this area. *Thurman v. Com.*, 975 S.W.2d 888, 893 (Ky.1998). Subterfuge is also forbidden by SCR 3.130(3.4)(e).

- o. **Type of evidence allowed.** Nothing in Article 6 limits the kind of evidence that may be used to impeach. If a witness denies making a deal with the Commonwealth, the impeaching party has the right to prove otherwise through stipulation of the Commonwealth or introduction of testimony. Tape recordings or testimony by witnesses who heard out of court statements may be necessary to impeach by this method. The judge has authority under KRE 403 and 611(a) to place limits on how much evidence will be produced and when it can be produced.

### **Rule 608: Evidence of character**

- a. Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- b. Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.
- c. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

**HISTORY:** Amended by Supreme Court Order 2003-3, eff. 7-1-03, 1992 c 324 § 14, 34, eff. 7-1-92; 1990 c 88, § 41

#### **DISCUSSION:**

Evidence of a witness's character or a trait of character may not be introduced to prove action in conformity with character under KRE 404(b) except as authorized under KRE 607, 608, and 609. KRE 608 tells how to attack character. Effective July 1, 2003, Rule 608 allows opinion as well as reputation evidence, and allows specific instances of conduct to be explored, though only in cross-examination. Now a witness may testify that "X might tell you the truth, and again she might not," and probably permissible to opine outright, "I think X is a liar," or "I think X is capable of lying." *Stewart v. Com.*, 197 S.W.3d 568 (Ky.App. 2006) (mother's testimony that she believed her child capable of fabricating her identification of shooter was admissible). *Cf., Lanham v. Com.*, 171 S.W.3d 14, 23 (Ky. 2005) (improper for a witness to characterize the testimony of another witness as "lying").

- a. **Bias.** The specifics of a witness's crime are not necessarily barred under KRE 609 if offered for some other legitimate purpose besides showing the witness's bad character. The specifics are always admissible if relevant to show bias. *See Miller v.. Marymount Med. Ctr.*, 125 S.W.3d 274, 281-82 (Ky.2004); Robert G. Lawson, *The Kentucky Evidence Law Handbooks* 4.10[2] at 279-80 (4th ed. 2003) ("The plea bargaining strategies of prosecutors and other characteristics of the criminal law and its processes encourage participants in crime to trade testimony for favored treatment.")
- b. **Convictions.** So long as a proponent does not attempt to prove the conduct involved in a misdemeanor conviction by extrinsic evidence, simple inquiry about that conduct is acceptable under KRE 608. KRE 608(b) says nothing about barring "inquiries" into specific behavior, and actually expressly allows them on cross-examination if the behavior reflects on the witness's character for truthfulness. The rule says, only, that such conduct may not be proved by *extrinsic* evidence, except as allowed under KRE 609. *Allen v. Com.*, 2013 WL 1181802 (Ky. 2013) (not final).
- c. KRE 608 allows inquiry on cross-examination as to bad acts—with the limit being that the questioner is stuck with the answer, whatever it is. That such an inquiry may follow on the heels of a KRE 609 inquiry into whether the witness has a felony conviction, thereby leading the jury to believe that the bad act asked about was the basis for the felony conviction, is not barred by

## NOTES

- the rules. If this could mislead the jury—for example, if the bad act asked about under KRE 608 was not the basis for the conviction asked about under KRE 609—then a well-timed objection will allow the trial court to exercise its discretion to require handling the evidence in a fair and truthful manner. *Allen v. Com.*, 2013 WL 1181802 (Ky. 2013) (not final).
- d. **Defendant's character trait.** KRE 405(a) permits a defendant to present proof of a character trait to show conformance therewith only by evidence in the form of reputation or opinion. See *Johnson v. Com.*, 105 S.W.3d 430, 441 (Ky. 2003). Specific instances of conduct are admissible as character evidence only when a person's character is an essential element of a charge, claim, or defense (like EED) under KRE 405(c) and when elicited on cross-examination under KRE 608(b).
  - e. **Denial** by a witness as to knowledge of the specific incident raised on cross ends the inquiry. The rule prohibits introduction of extrinsic evidence for any purpose. *Blair v. Com.*, 144 S. W. 3d 801 (Ky. 2004). But refreshing memory should be allowed.
  - f. **Denial of a prior conviction.** The identity of a prior crime is inadmissible if offered to undermine the credibility of the witness “unless the witness has denied the existence of the conviction.” KRE 609(a).
  - g. **Direct exam.** Under KRE 608, a witness on *direct* examination cannot be asked about specific incidents. Such instances of misconduct can be raised only on cross examination. See **specific instances (o)**.
  - h. **Drug use.** A witness may be questioned regarding prior drug use as the reason for inability to recall or relate events. Robert G. Lawson concludes evidence of prior drug use is admissible under KRE 608 “to cast doubt on [the witness'] capacity to perceive” as well as the witness' “ability to remember or relate [.]” *Kentucky Evidence Law Handbook*, § 4.30(1) (4th ed.2003). *Cantrell v. Com.*, 288 S.W.3d 291, 296-97 (Ky. 2009).
  - i. **General lying, particular lying.** There's a big difference between an opinion that a witness is a liar in general and an opinion that the witness is lying about something in the particular case. The former is permitted by KRE 608. The latter is forbidden by KRE 401-403 and KRE 702. *Lanham v. Com.*, 171 S.W.3d 14, 23 (Ky.2005) (witness cannot be asked if another witness is lying); *Moss v. Com.*, 949 S.W.2d 579 (Ky. 1997).
  - j. **Limits on exploring bias.** Even when considered in the context of the Confrontation Clause. “Defendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys [the] power and discretion to set appropriate boundaries.” *Capshaw v. Com.*, 253 S.W.3d 557, 566-67 (Ky.App.2007), citing *Davenport v. Com.*, 177 S.W.3d 763, 768 (Ky.2005)). The judge may limit the number of witnesses put on to attack or to vouch for the truthful character of the witness. KRE 403; KRE 611(a).
  - k. **Prior acts not resulting in conviction.** KRE 608(b) permits impeachment by specific instances of conduct including bad acts that have resulted in a conviction. *Allen v. Com.*, 2013 WL 1181802 (Ky. 2013) (NOT FINAL). A witness may be cross-examined on a prior bad act regardless whether it has resulted in a criminal conviction if that act is “probative of truthfulness or untruthfulness,” and if “the cross-examiner has a factual basis for the subject matter of his inquiry.” *Allen; Rogers v. Com.*, 366 S.W.3d 446, 454 (Ky. 2012). But see **Convictions (b)**, above, for limits on such cross-examination.
  - l. **Rebuttal only.** If and only if a witness's veracity is attacked, the witness's proponent may rebut by introduction of reputation or opinion evidence that the witness is truthful. *Brown v. Com.*, 983 S.W.2d 513 (Ky.1999) (reversible error to allow witness for prosecution to testify holding a bible—citing KRE 607). A witness's character may not be rehabilitated by introducing inadmissible hearsay or testimony that vouches for the truthfulness of the witness's out-of-court statement. *Hoff v. Com.*, 2011 WL 6542997 (Ky. 2011) (FINAL) (reversed due to doctor's testimony that he believed victim); *cf.*, *Anderson v. Com.*, 231 S.W.3d 117 (Ky.2007) (harmless error to allow evidence of defendant's past criminal conduct because of counsel's statement during voir dire that he would testify).
  - m. **Reliability.** Evidence is not allowed under KRE 608 to show reliability, only to show truthfulness. *Fairrow v. Com.*, 175 S.W.3d 601, 606 (Ky. 2005) (informant). *Cf.*, *Baker v. Com.*, 320 S.W.3d 699,

## NOTES

701 (Ky. App. 2010) (asking informant if police had used him on several occasions before elicited inadmissible evidence of reliability, but error was harmless).

- n. **Reputation or opinion.** KRE 608(a) allows a witness to comment on another witness's reputation in the community for untruthfulness. Alternatively, the witness may give a personal opinion on this subject. Truthfulness is the only matter that can be discussed. *Fairrow v. Com.*, 175 S.W.3d 601, 606 (Ky. 2005).
- o. **Specific instances of truthfulness, untruthfulness.** KRE 608(b) excludes extrinsic evidence of specific incidents to attack or support the credibility of a witness. *Oakes v. Com.*, 320 S.W.3d 50, 54 (Ky. 2010) (KASPER report was not admissible to impeach a witness who had testified against him). The only exception is a prior felony conviction under KRE 609. This means that a witness on *direct* examination cannot be asked about specific incidents. But since July 1, 2003, a judge may allow a party to cross-examine a witness by describing specific instances of conduct that may bear on truthfulness or untruthfulness, and asking if the witness is aware of these incidents. *Shemwell v. Com.*, 294 S.W.3d 430, 436-37 (Ky. 2009) (witness who said she didn't know what meth looked like was properly cross-examined when asked if meth had been found in her house); *Fairrow v. Com.*, 175 S.W.3d 601, 605-606 (Ky. 2005).
- p. Evidence that is "probative of truthfulness or untruthfulness" under KRE 608(b), must still pass the balancing test in KRE 403 in order to be admissible. *See Rogers v. Com.*, 366 S.W.3d 446, 455 (Ky. 2012) (prejudice from questioning chemist if she had been accused of stealing a controlled substance outweighed probative value). If the witness denies knowledge of the specific incident raised on cross, the inquiry ends. *Dennis v. Com.*, 306 S.W.3d 466, 469 (Ky. 2010). *Berry v. Com.*, 84 S. W. 3d 82 (Ky. App. 2001). The rule prohibits introduction of extrinsic evidence for any purpose. *Oakes, supra*, and *Blair v. Com.*, 144 S. W. 3d 801 (Ky. 2004). But refreshing memory should be allowed.
- q. **Three-part analysis** under KRE 608(b): First, the specific incident must relate to the veracity of the witness. Second, the attorney must have a factual basis for believing that the incident occurred and the witness has some reason to know about it. Third, the proponent must convince the judge to permit the cross examination. Get a certified copy of the expert's prior contradictory testimony.
- r. **Timing.** When rehabilitation evidence is admitted before credibility is attacked, error is harmless as long as credibility is later impeached. *Fairrow v. Com.*, 175 S.W.3d 601, 606 (Ky. 2005) (*citing Reed v. Com.*, 738 S.W.2d 818, 821 (Ky. 1987)).
- s. **Truthfulness only.** Character evidence regarding a witness --other than evidence of prior conviction-- is limited to the trait of truthfulness or untruthfulness. *Fairrow v. Com.*, 175 S.W.3d 601, 606 (Ky. 2005) (distinguishing evidence of "reliability" which is not allowed); *Hodes v. Ireland*, 2009 WL 1830758 (Ky. 2009) (Unreported) (trial court within sound discretion permitted cross-examination concerning the expert's medical licenses).

### **Rule 609: Impeachment by evidence of conviction of crime**

- a. **General rule.** For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.
- b. **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.
- c. **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

**HISTORY:** 1992 c 324, § 15, 34, eff. 7-1-92; 1990 c 88, § 42

**DISCUSSION:**

## NOTES

The Kentucky Supreme Court in *Hodge v. Com.*, 17 S.W.3d 824, 848 (Ky.1999), recognized that the procedure for impeaching a witness with a prior felony conviction was established in *Com. v. Richardson*, 674 S.W.2d 515 (1984), as follows:

[A] witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions, and to the extent that *Cowan [v. Com.]*, 407 S.W.2d 695 (Ky.1966)] limits such evidence to one prior conviction, it is overruled. After impeachment, the proper admonition shall be given by the court.

*Richardson*. at 517-18.

- a. **Admonition** is required because of the highly prejudicial nature of prior conviction evidence. *An admonition may be waived if not requested. Romans v. Com.*, 547 S.W.2d 128, 130 (Ky.1977). The standard admonition in the circuit judge's book is verbose and confusing. Nothing prevents an attorney from suggesting a simpler admonition: *Members of the jury: The witness has admitted conviction of a crime in the past. You must decide if this conviction affects your estimate of his credibility and, if it does, how much effect it has. This is the only purpose for which you can use this evidence.*
- b. **Age of conviction.** If a party desires to impeach a witness with a prior felony conviction that is less than 10 years old, KRE 609(a) provides that it "shall be admitted." Ordinary KRE 401-403 balancing and analysis does not apply to these convictions.
- c. **Confrontation clause violation** as possible exception. The Kentucky Supreme Court has stated (in dicta) that the Confrontation Clause of the 6<sup>th</sup> Amendment is "implicated if the excluded cross-examination concerns a matter giving the witness reason to testify falsely during the trial at hand." *McPherson v. Com.*, 360 S.W.3d 207, 213 (Ky. 2012) (dicta), *citing Beaty v. Com.*, 125 S.W.3d 196, 206 (Ky.2003) (dicta).
- d. **Diversion.** A witness may not be question regarding a crimes resolved by diversion and not resulting in conviction. *Farmer v. Com.*, 309 S.W.3d 266, 272 (Ky. App. 2009).
- e. **Good faith basis.** The Commonwealth must have a good faith basis to ask about a prior conviction. *Chavies v. Com.*, 374 S.W.3d 313, 322 (Ky. 2012) ("trusting" that prosecutorial error in asking without a good faith basis if three witnesses had felony convictions would "not occur on retrial").
- f. **Identifying the crime** is not permitted. KRE 609(a) limits the use for impeachment purposes of a prior felony conviction to the fact of conviction and expressly disallows disclosure "of the crime upon which conviction was based ... unless the witness has denied the existence of the conviction." *McPherson v. Com.*, 360 S.W.3d 207, 212-13 (Ky. 2012); *Blair v. Com.*, 144 S. W. 3d 801 (Ky.2004); *Caudill v. Com.*, 120 S. W. 3d 635 (Ky.2003); *Slaven v. Com.*, 962 S.W.2d 845, 859 (Ky.1997).
- g. **Inquiry is limited.** A party may ask a witness if he has been convicted of a felony, but cannot inquire further, or offer extrinsic evidence on the nature of a party's criminal record once the party has acknowledged the prior conviction. *Dickerson v.Com.*, 174 S.W.3d 451 (Ky. 2005) [applying reasoning in *Old Chief v. U. S.*, 519 U.S. 172, 190-91 (1997) and finding that where a defendant offered to stipulate to a prior conviction relevant to defendant's status, trial court abused its discretion by permitting government to prove the nature of the offense over defendant's objection]; *see also, Polk v. Greer*, 222 S.W.3d 263, 265 (Ky.App.2007) (after Polk admitted prior felony in voir dire, Greer called Polk a persistent felon in opening statement, --reversed).
- h. **Juvenile** adjudications of felonies are not allowed as impeachment. KRS 532.055(2)(a)(6), which purported to allow the use of juvenile adjudications of felony as impeachment evidence was declared invalid as a violation of separation of powers in *Manns v. Com.*, 80 S. W.3d 439 (Ky. 2002). KRS 610.320(4), allowing use of prior juvenile adjudications to impeach, has similarly been ruled unconstitutional in an unpublished Court of Appeals opinion. *White v. Com.*, 2004 WL 405980 (Ky.App.2004) (Unreported). The Commonwealth has conceded that use of a juvenile adjudication to impeach is reversible error. *Barroso v. Com.*, 122 S. W. 3d 554 (Ky.2003).



## NOTES

- i. **Misdemeanors.** It is improper to impeach with a Kentucky misdemeanor conviction. *Chavies v. Com.*, 374 S.W.3d 313, 322 (Ky. 2012). Any crime punishable by death or at least one year under the law of the jurisdiction in which the conviction was had may be used. Any felony, not just those dealing with honesty, may be used. A misdemeanor from another state may be considered a felony for Rule 609 purposes. If the foreign conviction could have resulted in a sentence of one year or more in prison or jail, it is a felony for Rule 609 purposes, regardless of what the other state calls it.
- j. **Non-witnesses** may not be impeached with evidence of a prior conviction. *Anderson v. Com.*, 231 S.W.3d 117 (Ky. 2007) (defendant did not take the stand); *Polk v. Greer*, 222 S.W.3d 263 (Ky.App. 2007).
- k. **Proof, manner of.** There are two ways to prove prior conviction: (1) an admission from the witness, and (2) introduction of a public record if the witness denies conviction.
- l. **Remoteness** (convictions over ten years old). Remote convictions are excluded because the jury “might associate prior guilt with current guilt.” *Perdue v. Com.*, 916 S.W.2d 148, 167 (Ky.1995). If a conviction is more than ten years old, 609(b) says it is not admissible unless the probative value of the conviction substantially outweighs its prejudicial effect. *Holt v. Com.*, 250 S.W.3d 647 (Ky.2008) (abuse of discretion to allow convictions 24 and 25 years old). This is the inverse of ordinary KRE 403 balancing. Under KRE 403, relevant evidence is admissible unless its probative value is substantially outweighed by its prejudicial effect. Under KRE 609(b), the evidence is inadmissible unless its prejudicial effect is substantially outweighed by its probative value. *Miller v. Marymount Medical Center*, 125 S. W. 3d 274, 284 (Ky. 2004). The burden is on the party desiring to use the conviction. *McGinnis v. Com.*, 875 S.W.2d 518 (Ky. 1994) *overruled on other grounds by Elliott v. Com.*, 976 S.W.2d 416 (Ky. 1998); see also *McCullum v. Com.*, 2006 WL 436107 (Ky. 2006) (Unreported) (conviction 19 years old was introduced to show lustful inclination and was not harmless error). An alleged alternative perpetrator’s prior conviction should not be excluded for remoteness because an “aaltperp”’s guilt is not at issue. *But see, Com. v. Bowles*, 237 S.W.3d 137, 140 (Ky.2007) (counsel who failed to object to disallowance of 18-year-old conviction showing aaltperp m.o. was not ineffective).
- m. **Pardoned, annulled, or otherwise set aside** based on innocence. Reversal on appeal or dismissal for insufficient evidence satisfies the last requirement of 609(c). A pardon from the governor under Section 77 of the Constitution qualifies, but a restoration of rights under Section 145 does not.

**Rule 610: Religious beliefs or opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 42

**DISCUSSION:**

- a. **Section 5 of the Ky. Const.** prohibits diminution of civil rights, privileges or capacities because of religious belief or disbelief. A witness is not disqualified to testify and cannot be cross-examined on religious beliefs for the purpose of discrediting the witness. *L & N R. Co. v. Mayes*, 26 Ky.L.Rptr. 197, 80 S.W. 1096 (Ky.1904). Rule 610 codifies this constitutional principle.
- b. **Religious belief or opinion evidence** is not admissible to undermine or bolster credibility of a witness. *Cf., Pogue v. Com.*, 2006 WL 3231397, (Ky.App. 2006) (Unreported) (unpreserved error including juror’s reference to another juror’s religion and belief he would not lie, and evidence the organization Pogue allegedly stole from was Christian did not impermissibly bolster witnesses based on religion, and did not violate KRE 610).

Evidence of religious beliefs or opinions to prove other matters would be admissible if it satisfied other evidence rules.

**Rule 611: Mode and order of interrogation and presentation**

- a. **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

## NOTES

1. Make the interrogation and presentation effective for the ascertainment of the truth;
2. Avoid needless consumption of time; and
3. Protect witnesses from harassment or undue embarrassment.

- b. **Scope of cross-examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination.
- c. **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 44

**DISCUSSION:**

KRE 611 (along with KRE 102, 106, and 403) gives the judge guidance on what to do when evidence questions are not clearly governed by the Rules. It does not supersede the general order of proceedings set out in RCr 9.42, or the other Rules of Evidence. KRE 611(b) and (c) deal with cross-examination. But KRE 611(a) imposes a mandatory duty on judges to exercise reasonable control over the introduction of evidence.

**KRE 611(a)**

- a. **Bickering or brow-beating between a lawyer and witness.** KRE 611(a)(3) authorizes the judge to control improper behavior. SCR 3.400(3)(A)(8) places a burden on the judge to control proceedings so that lawyers refrain from "manifesting bias or prejudice against parties, witnesses, counsel or others unless race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status or other similar factors are issues in the proceeding."
- b. **Completeness.** KRE 611(a)(1) includes an implicit rule of completeness for non-written and non-recorded statements—a gap left by KRE 106. *James v. Com.*, 360 S.W.3d 189, 205 (Ky. 2012). See also KRE 106, 612, 803 and 804. Completeness is within the sound discretion of the judge. *Soto v. Com.*, 139 S. W. 3d 827 (Ky. 2004). Judges are encouraged to use KRE 403 balancing to guide decisions under this rule. *Com. v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).
- c. **Cross exam may be limited by a judge** for any of the three purposes specified by KRE 611(a) (truth, time, harassment). *Caudill v. Com.*, 120 S. W. 3d 635 (Ky. 2003). But denial of effective cross-examination is reversible without showing prejudice. A denial of effective cross-examination is a constitutional error of the first magnitude, and no showing of want of prejudice will cure it. *Davis v. Alaska*, 415 U.S. 308, 318–19 (1974). The 6<sup>th</sup> Amendment of the U.S. Const. and §11 of the Ky. Const. preserve a criminal defendant's right to confront witnesses. *Crawford v. Washington*, 541 U.S. 36 (2004); *Rogers v. Com.*, 992 S.W.2d 183, 185 (Ky.1999).
- d. **Discretion.** Courts have "wide discretion" under KRE 611(a) over the nature and scope of direct, redirect, and recross examination. *Brown v. Com.*, 174 S.W.3d 421, 431 (Ky. 2005), citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 3.20[5], at 245 (4th ed. LexisNexis 2003). Cross-exam is always "wide open." See 611(b), below. Moreover, it is only the "general rule" that redirect exam should be limited to questions explaining matters developed on cross-examination. Trial courts have always had substantial discretion to allow departure from the norms. *Brown*, 174 S.W.3d at 431, citing *White v. Com.*, 292 Ky. 416, 166 S.W.2d 873, 877 (1942).
- e. **Extrinsic evidence under KRE 106** may cause delays to obtain evidence. The judge has authority under this section to require introduction of the evidence later.
- f. **Federalize.** Confrontation and due process rights are violated when limits on cross become unreasonable. When the jury is given enough information to make the desired inference, the right of confrontation is not violated. *Weaver v. Com.*, 955 S.W.2d 722, 726 (Ky.1997). It was not a denial of confrontation rights to require counsel --rather than a *pro se* defendant-- to cross-examine a child victim and was reasonable under KRE 611. *Partin v. Com.*, 168 S.W.3d 23 (Ky. 2005). If cross examination creates a reasonably complete picture of the witness's veracity, the constitutional confrontation requirement has been met. *Bratcher v. Com.*, 151 S. W. 3d 332 (Ky. 2004). The defendant has a constitutional right to "reasonable" cross examination that

## NOTES

includes questions tending to show the witness's bias, animosity or any other reason that the witness would testify falsely. *Beatty v. Com.*, 125 S. W. 3d 196 (Ky. 2003). Limits on cross-exam may also violate due process. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *DeGailey v. Com.*, 508 S.W.2d 574 (Ky.1974).

- g. **"Invited error" and "opening the door"** are often associated with KRE 611(a). Courts allow inadmissible as well as admissible evidence in rebuttal when a party has introduced inadmissible evidence. This is to "neutralize or cure any prejudice...." *Com. v. Alexander*, 5 S.W. 3d 104, 105 (Ky.1999); see also *Com. v. Gaines*, 13 S.W. 3d 923, 924 (Ky.2000).
- h. **Language barrier.** Leading questions may be allowed when a witness is not fluent in English. *Gusman v. Com.*, 2010 WL 199425 (Ky. App. 2010) (Unreported)
- i. **Limiting instructions** may be given by a judge *sua sponte*, without request of a party. KRE 611(a) and KRE 105 can be read together to impose a duty to do so. Certainly the Rule authorizes it. Evidence of limited admissibility is effective for the ascertainment of the truth only when properly limited by admonition. The second sentence of KRE 105(a)[requiring preservation] is a penalty on appeal, not a restriction on the trial judge.
- j. **"Opening the door"** can result from intentional or inadvertent blurts by a witness, or inquiry into subjects previously ruled irrelevant or otherwise inadmissible. See Invited error (g).
- k. **Order of proceedings.** It was not an abuse of discretion to require the expert witnesses to be called following the lay witnesses. *Cantrell v. Ashland Oil, Inc.*, 2010 WL 1006391 (Ky. 2010) (Unreported) Note this is a civil case. A different outcome might be required in a criminal case.
- l. **Preemptive actions by a judge.** KRE 611(a) allows preemptive action when a problem has arisen and the judge must decide what steps short of mistrial might correct the problem. KRE 103(a) and (d) and KRE 401-403 are expected to resolve problems before the jury is exposed to improper information.
- m. **Recesses.** Whether to prohibit --or not to prohibit-- attorneys from speaking with a witness during a recess is within the court's discretion under KRE 611(a). *St. Clair v. Com.*, 140 S. W. 3d 510 (Ky.2004). But see, *Geders v. U. S.*, 425 U.S. 80, 91 (1976) (barring attorney/ client contact during overnight recess violates 6A); *cf.*, *Beckham v. Com.*, 248 S.W.3d 547 (Ky.2008) (no 6A or *Geders* violation when court did not limit *all* communication with counsel during overnight recess, but only forbade discussion re: ongoing testimony).
- n. **Redirect.** New evidence on redirect can be allowed, within the trial court's discretion. *Brown v. Com.*, 174 S.W.3d 421, 431 (Ky.2005).
- o. **Tape recordings, audibility.** Under KRE 611 (a) and 403, the judge decides whether technical problems with a tape resulting in inaudible portions are serious enough that the jury would be misled as to their content or are such that the tape would be untrustworthy. *Gordon v. Com.*, 916 S.W.2d 176, 180 (Ky.1995); *Perdue v. Com.*, 916 S.W.2d 148, 155 (Ky.1995); *Norton v. Com.*, 890 S.W.2d 632 (Ky.App.1994).
- p. **Time.** Needless consumption of time can be minimized by the judge, who has power to control presentation of evidence under KRE 611(a)(2). The judge has an ethical duty under SCR 4.300(3)(A)(4) to accord every person "and his lawyer" full right to be heard according to law. KRE 611(a)(2) does not authorize the judge to practice the case for the parties or to exclude evidence simply because production of the evidence might delay proceedings. A two-week recess until a witness could be called and examined was upheld in *M. J. v. Com.*, 115 S. W. 3d 830 (Ky.App.2002).
- q. **Transcripts** to supplement or substitute for a tape are options within the judge's discretion. The judge may use these to fill in the inaudible portions. However, a witness cannot "interpret" the tape, and must testify from memory. *Gordon, supra*, 916 S.W.2d at 180. Federal practice authorizes the use of such composite tapes. *U.S. v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994).

**KRE 611(b)**

- a. **Children as witnesses.** Examination and cross-examination of a child may occur outside the courtroom and outside the presence of the defendant, who may watch via TV. See 1996

## NOTES

amendment to KRS 431.350. This was upheld in *Stringer v. Com.*, 956 S.W.2d 883, 886 (Ky.1997); see also *Com. v. M. G.*, 75 S. W. 3d 714 (Ky. App.2002). Section 11 of the Ky. Const. expressly gives a criminal defendant the right to “meet the witnesses face to face.” KRS 431.350 does not square with the §11 and should be objected to at trial as unconstitutional, with written notice to the AG.

- b. **Credibility of witness.** The credibility of a witness is always at issue under KRE 611(b). *Barnett v. Com.*, 317 S.W.3d 49, 61 (Ky. 2010).
- c. **Limits.** Both KRE 611(a) and 403 authorize the judge to place “reasonable” limits on the timing and subject matter of direct, re-direct and cross-examination. But see *Embry v. Turner*, 185 S.W.3d 209 (Ky.App. 2006) (judgments will not be reversed because of leading questions unless there’s a shocking miscarriage of justice); and *Moody v. Com.*, 170 S.W.3d 393 (Ky.2005) (cross-exam denied only with respect to collateral issues does not implicate the 6A right to confront).
- d. **Wide open cross-examination.** The trial court may limit cross-examination but not because of the bare reason that it involves matters not covered on direct. It may limit such examination “when limitations become necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack.” *Derossett v. Com.*, 867 S.W.2d 195, 198 (1993) (quoting from Lawson, *The Kentucky Evidence Law Handbook* § 3.20(11) (3d ed.1993)). Relevancy alone defines the scope of cross-examination. A trial judge restrains authority to impose reasonable limits. *Id.* But look out: in *Vires v. Com.*, 2008 WL 4692362 (Ky. 2008) (Unreported) the Kentucky Supreme Court held it was reversible error to limit cross-examination of a key witness to what was asked in a deposition. This was “contrary to not only the Confrontation Clause, [but it] also violate[d] KRE 611(b), our rule of “wide open” cross-examination.”

## KRE 611(c)

- a. **Children, people with communication problems.** See “Leading questions are permitted (g), below.
- b. **Direct exam.** Leading questions “should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.” Failure to abide by KRE 611(c) in this regard can be “significant.” *Holt v. Com.*, 219 S.W.3d 731 (Ky. 2007) (unsworn prosecutor asked whether witness recalled telling the prosecutor the opposite of his testimony --reversed).
- c. **Definition.** A leading question is one that suggests the answer to the witness. “You were robbed on March 15th, weren’t you?” is leading. “Did anything happen to you on March 15th?” is not.
- d. **Foundation questions are not leading:** *e.g.*, “Were you in the Kroger on March 15th? Did something happen? Did you see what happened? What happened?” The first three questions require yes or no answers, but they are not leading. They are unobjectionable foundation questions required by KRE 602 to show personal knowledge. The old rule of thumb that leading questions require yes or no answers is unreliable.
- e. **Hostile witness may be led on direct examination** when his answers or lack of answers show that the witness will not testify fairly and fully in response to open-ended questions. A witness is not hostile simply because of association with the other side in a case. Hostility must be shown by refusal to answer fully and fairly before the request to use leading questions is made. *Malm v. Com.*, 2008 WL 3890077 (Ky. 2008) (Unreported) (okay to lead “evasive” witness).
- f. **Lead officer or detective,** if identified as the representative of the Commonwealth, or as a person essential to presentation of the Commonwealth’s case under KRE 615 , is “a witness identified with an adverse party” and can be led on direct examination by the defendant.
- g. **Leading questions are permitted** “to develop the testimony.” In other words, if a little leading will get an excited, confused or verbose witness settled down and testifying, the practice should not be discouraged. This portion of the Rule permits leading of child witnesses or persons with communication problems. *Humphrey v. Com.*, 962 S.W.2d 870, 874 (Ky.1998). See also *Gusman v. Com.*, 2010 WL 199425 (Ky. App. 2010) (Unreported) (leading allowed for witness who was not fluent in English).
- h. **Unrefreshed memory.** Leading questions may be used to refresh a witness’s memory when other attempts to refresh memory under KRE 612 fail. See below.

**Rule 612: Writing used to refresh memory**

## NOTES

Except as otherwise provided in the Kentucky Rules of Criminal Procedure, if a witness uses a writing during the course of testimony for the purpose of refreshing memory, an adverse party is entitled to have the writing produced at the trial or hearing or at the taking of a deposition, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 45

**DISCUSSION:**

This is a special version of the rule of completeness, used when a witness “uses a writing during the course of testimony for the purpose of refreshing memory.” If the writing was not provided in discovery, the adverse party, in fairness, should have a chance to see the complete document. The first phrase, “except as otherwise provided...” subordinates relief under this rule to the relief provided for in RCr 7.24 and 7.26 governing discovery and document production.

- a. **Failure to refresh.** If refreshing fails, the witness is disqualified to testify for lack of personal knowledge. KRE 602. Whether the witness is disqualified from testifying at all or only disqualified as to certain subject matters is a judgment call pursuant to KRE 403 and 611(a). If the witness has already testified to some facts, the adverse party may move to strike under KRE 103(a), or move for mistrial, if a limiting instruction to ignore the testimony will not suffice.
- b. **Past recollection recorded** is different from refreshed memory. See *Disabled American Veterans, Dept. of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541 (Ky.App. 2005). A refreshed memory is only possible when the witness has some memory of the event, capable of being refreshed. Past recollection recorded is only admissible when the witness has “insufficient recollection to enable the witness to testify fully and accurately.”
- c. **Police officers** present a problem of “hybrid” testimony. They often say they don’t remember all the details of an investigation. They then proceed to testify, reading from their case file as a crib sheet. This hybrid form of testimony is not personal knowledge, refreshed memory, or recorded recollection. The judge has authority to allow it under KRE 611(a) & (b) if it will contribute toward ascertainment of truth and avoid wasted time. But the judge must consider the likelihood that the jury will be misled. The judge should require the proponent first to show:
  1. That the officer’s testimony is actually needed. Much of an officer’s testimony concerns irrelevant details of a police investigation.
  2. That the officer cannot testify coherently from memory alone.
  3. That the officer’s reading of recorded recollection is not a sufficient substitute for the officer’s testimony. KRE 803(5).
  4. That the officer’s testimony will be based mostly on present personal knowledge and the writing or prompt will be used only to fill in occasional details.
  5. That the jury will be able to distinguish the portions of testimony that come from personal knowledge from the portions derived from other sources.
- d. **Privileged matters.** See Prompts (f).
- e. **Procedure.** There is no set procedure for refreshing memory. At minimum the proponent of refreshing should show that the witness had cause to know the subject matter, but that for some reason, (stage fright, passage of time, illness, etc.), cannot recall well enough to testify coherently or effectively about it. The judge may require the proponent to get permission to refresh or may leave it to the adverse party to object. If the witness’s memory is refreshed, the writing or other prompt should be taken away from the witness so she can testify from memory. Leading questions should be discontinued at this point. If the witness still cannot remember, the proponent can try leading questions, a writing, a photograph or any other prompt. There is no requirement that it be prepared by the witness or that the witness even know of its existence.

## NOTES

- f. **Prompts.** Parts of the “memory prompt” may be irrelevant. Upon request, the judge is required to make an *in camera* inspection to determine if some parts should be deleted before the “prompt” writing is turned over to the adverse party. Presumably this is a KRE 401-403 determination. Parts of the prompt may be privileged. For instance, a lawyer may review an old case file prior to testifying in an RCR 11.42 proceeding to refresh her memory. KRE 509 provides that a party may waive a privilege by voluntarily disclosing or consenting to disclose “any significant part” of the privileged matter. If the writing that the proponent wants to use to refresh has privileged matter in it, the proponent must assert the privilege at the earliest possible time, preferably before using the writing as a prompt.
1. Who may examine the prompt? This depends on its use. Prosecutors sometime mail transcripts of statements or other notes to witnesses weeks before trial. Sometimes witnesses review these prompts just before going into the courtroom to testify. If a prompt was “used” to refresh memory, the adverse party is entitled to look at it. The adverse party may ask about use of prompts in a pretrial motion or elicit this information on cross-examination. KRE 612 differs from the federal rule, which contains a specific subsection allowing the judge to order access to statements. The Kentucky language mandates access if the prompt is “used.”
  2. The prompt does not acquire any status as evidence from being used as a prompt. It may not be introduced as such by the party using it to refresh memory and it “cannot be read [into evidence] under the pretext of refreshing the recollection of the witness.” R. Lawson, *The Kentucky Evidence Law Handbook* § 3.20, at 162 (3d ed. Michie 1993) (quoting *Payne v. Zapp*, 431 S.W.2d 890, 892 (Ky. 1968)). The writing is not introduced into evidence. *Berrier v. Bizer*, 57 S.W.3d 271, 276-77 (Ky. 2001).
- g. **Recorded recollection.** If memory is not refreshed, then a past “recorded recollection” may come in as a hearsay exception under KRE 803(5). A witness who cannot testify from memory may still be the conduit for recorded recollection under KRE 803(5), if he can testify to the foundational requirements of that rule.
- h. **Scope.** The rule applies to witnesses testifying at a trial, deposition, or any other proceeding at which the evidence rules apply. KRE 102.

**Rule 613: Prior statements of witnesses**

- a. Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.
- b. This provision does not apply to admissions of a party-opponent as defined in KRE 801A.

**HISTORY:** 1992 c 324, § 16, 34, eff. 7-1-92; 1990 c 88, § 46

**DISCUSSION:**

KRE 613 lists the foundation requirements for impeachment with out-of-court statements. Traditionally juries were allowed to consider such statements only as “straight impeachment” re: the credibility of present testimony, and this use has survived. Kentucky also allows prior inconsistent statements to be considered as substantive evidence. *Jett v. Com.*, 436 S.W.2d 788 (Ky.1969). Not surprisingly, substantive use of out-of-court statements has eclipsed straight impeachment. KRE 801A(a)(1) embodies *Jett* and rejects the more limited federal approach to substantive use.

- a. **Absence of impeached witness.** This rule and KRE 801A(a) presume that the maker of the different statement will be present and subject to questioning. *Thurman v. Com.*, 975 S.W.2d 888, 893 (Ky.1998). But the second sentence of KRE 613 allows introduction of the different statement when the witness is not present if the judge finds that the “impeaching party has acted in good faith.”
- b. **Admissions by a party.** KRE 613(b) exempts party admissions under KRE 801A(b) from the foundation requirement. But statements by a party that are not admissions require a foundation

## NOTES

to be laid under KRE 613(a). *Meece v. Com.*, 348 S.W.3d 627, 664 (Ky. 2011) *cert. denied*, 133 S. Ct. 105 (2012) (Meece's statement that he was good at lying about himself with a straight face introduced in the Commonwealth's case-in-chief, rather than having been explored on cross-examination of Meece with a foundation laid via KRE 613(a) was error, but harmless).

- c. **Inability to recall prior statement.** "A statement is inconsistent for purposes of KRE 801A(a)(1) whether the witness presently contradicts or denies the prior statement, *or whether he claims to be unable to remember it.*" *Brock v. Com.*, 947 S.W.2d 24, 27 (Ky.1997) (emphasis added).
- d. **"Different," and "Inconsistent."** The statements need not be outright contradictory. KRE 613 uses the word "different." KRE 801(a)(1) uses the word "inconsistent" to describe the types of statements that trigger impeachment. Both words imply that the in-court testimony differs from the out-of-court statement by adding or deleting some details. The judge must decide whether the difference or inconsistencies in the statements are sufficient to justify impeachment. Impeachment on "collateral" matters is not encouraged. KRE 403; 611(a)(2). See also Inability to recall (c)
- e. **Foundation.** Failure to lay a proper foundation under KRE 613 for introduction of prior statements waives any error in excluding those statements. *Gray v. Com.*, 203 S.W.3d 679, 685 (Ky. 2006). A witness's prior description of the killer and failure to identify the defendant during the photo line-up are only admissible if a foundation is laid with that witness in accordance with KRE 613. *Young v. Com.*, 50 S.W.3d 148, 167 (Ky. 2001). See How to impeach (g).
- f. **Hearsay.** KRE 801A(a)(1) exempts the witness's different statement from the hearsay exclusionary rule. Because the statement is relevant, it may be introduced as substantive evidence that the truth is something other than the witness's trial testimony.
- g. **HOW TO IMPEACH** with prior inconsistent statement:
  - 1. **Foundation required.** The examiner must notify the witness of the time, place and circumstances of the other statement, to refresh his recollection as to the making and substance of the other statement. Failure to lay the KRE 613 foundation renders the issue unpreserved, and unreviewable. *Gray v. Com.*, 203 S.W.3d 679 (Ky.2006).
  - 2. The foundation is not elaborate:
    - A. Witness testifies that defendant robbed him.
    - B. Examiner asks:
      - i. "Do you recall talking about this case with Officer X on March 15, 2005 at LMPD Headquarters?" "Yes."
      - ii. "Were Detectives Y and Z there also?" "Yes."
      - iii. If the other statement is in writing, it is presented to the witness to review. *Com. v. Priddy*, 184 S.W.3d 501 (Ky.2005).
      - iv. If not in writing, the examiner asks "Did you tell them that you could not identify the robber because he wore a mask?"
      - v. If in writing, the examiner reads exactly what is on the page: "Did you tell them 'I, uh, I could not say because, um, um, he had like a mask that he was wearing'."
    - C. Witness answers "yes, no, or I don't know."
  - 3. **If the answer is yes**, the witness must be allowed to explain apparent differences. If the witness admits that the other statement is more accurate, there is no need to examine further. The witness may also try to reconcile the statements. The witness may deny making the other statement.
  - 4. **If the answer is no, or I don't know (or recall)** making the statement or cannot recall its substance, this rule anticipates introduction of other evidence to show that the other statement was made, that it was different from trial testimony, that the witness who made the two different statements is untruthful, and should be disregarded. The adverse party may request a limiting admonition.
- h. **Opportunity to explain.** See How to impeach (g).
- i. **Other evidence**, introduction. See How to impeach (g).

## NOTES

- j. **Prosecutor as recipient** of different story. When the prosecutor is the person to whom the witness has told a different story, the rule still applies. But the prosecutor may not—in the guise of questioning the witness—insert her own testimony as to what the witness said. *Holt v. Com.*, 219 S.W.3d 731 (Ky.2007). The proper procedure is for the prosecutor to ask the witness if he or she made an earlier statement, and to identify the location, persons present, and approximate time. The witness can be asked to repeat that statement. If the witness denies the statement or repeats it in a materially different form, *another* who was present during the conversation (not the prosecutor) may testify as to its content. *Id.* at 738-739.
- k. **Rehabilitating the witness** by showing other statements consistent with the trial testimony is not an absolute right. KRE 801A(a)(2) limits the use of consistent statements.
- l. **Substantive use of prior inconsistent statements** is discussed in detail in KRE 801A. The foundation for use as both impeachment and substantive evidence is discussed here. Kentucky allows prior inconsistent statements to be considered as substantive evidence. *Jett v. Com.*, 436 S.W.2d 788 (Ky.1969). Not surprisingly, substantive use of out-of-court statements has eclipsed straight impeachment. KRE 801A(a)(1) embodies *Jett* and rejects the more limited federal approach to substantive use.
- m. **Time, place and circumstances.** *Noel v. Com.*, 76 S.W.3d 923, 930 (Ky.2002) notes *Kinser* as a narrow exception to strict foundational requirements of KRE 613(a)). In *Kinser v. Com.*, 741 S.W.2d 648, 652 (Ky.1987) the Court found an adequate foundation had been laid when witness was asked and admitted having the conversation with a particular detective, yet denied making particular statement in that conversation). In *Johnson v. Com.*, 2008 WL 4691694 (Ky. 2008) (Unreported) the Court noted that failure to identify the detective could result in failure to qualify under this exception. See How to impeach(g).

**Rule 614: Calling and interrogation of witnesses by court.**

- a. **Calling by court.** The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
- b. **Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.
- c. **Interrogation by juror.** A juror may be permitted to address questions to a witness by submitting them in writing to the judge who will decide at his discretion whether or not to submit the questions to the witness for answer.
- d. **Objections.** Objections to the calling of witnesses by the court, to interrogation by the court, or to interrogation by a juror may be made out of the hearing of the jury at the earliest available opportunity.

**HISTORY:** 1992 c 324, § 17, 34, eff. 7-1-92; 1990 c 88, § 47

**DISCUSSION:**

The Commentary suggests that judge and juror questions should be used sparingly by pointing out that KRE 614(b) merely “adopts well-established principles concerning judicial participation in the production of evidence,” noting that “[b]ecause of the risk that judicial participation in the production of evidence might unduly influence the triers of fact, it is expected that courts will use this power sparingly and always with sensitivity to the potential for unfairness to the litigants.” KRE 614(b), Drafters' Commentary (1989). The rule is intended to codify existing law, and therefore cases prior to the adoption of the rules may be relevant.

- a. **Bench trials.** During a bench trial, judicial questioning of witnesses is subject to the court's discretion. *Couch v. Com.*, 256 S.W.3d 7, 11-12 (Ky. 2008), *citing*. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky.2002) (finding no violation of KRE 614 when trial judge re-opened the evidence and called a witness to testify after closing arguments).
- b. **Delayed objections, out of hearing of the jury** are allowed in KRE 614(d). But see, *Allen v. Com.*, 286 S.W.3d 221, 231 (Ky. 2009) (finding no palpable error when the trial court informed the jury that Allen's counsel objected to jurors questioning a witness but the Commonwealth did not).
- c. **Undue influence** of the trial judge on the fact-finding process is avoided by adversary presentation of evidence. The judge must be careful not to cross the line between judge and advocate, and



## NOTES

become, in the jury's view, an advocate for one side. *Terry v. Com.*, 153 S.W.3d 794 (Ky. 2005) (cautioning a judge who asked an eyewitness 103 questions that on re-trial he should consider that KRE 613 advises judges should question witnesses "sparingly"); see also *LeGrande v. Com.*, 494 S.W.2d 726, 731 (Ky. 1973) (finding that a trial court judge cannot ask questions that place "the judge in the role of a prosecutor rather than an arbiter").

- d. **Written questions.** Jurors may submit written questions to the judge under KRE 614(c). The judge then decides whether the questions may be asked. The requirement of written questions avoids juror "blurts" that may precipitate motions for mistrial. As with judge questions, the danger with juror questions is that jurors may be transformed from neutral fact-finders to inquisitors or advocates. This is fine in the jury room after the case is submitted, but not before.

### **Rule 615: Exclusion of witnesses**

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person;
2. An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
3. A person whose presence is shown by a party to be essential to the presentation of the party's cause.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 48

#### **DISCUSSION:**

The judge has authority to exclude witnesses from the courtroom during the testimony of other witnesses *sua sponte*, and must exclude witnesses upon the request of a party. In *Mills v. Com.*, 95 S.W.3d 838 (Ky.2003), the Court held that permitting a robbery witness to remain in the courtroom constituted reversible error. The witness in *Mills* was the sole witness to the robbery, rendering his credibility of critical importance.

- a. **Child victim.** See *Holland v. Com.*, 2008 WL 3875430 (Ky. App. 2008) (Unreported) (approving child victim as "essential" to sit at prosecution table throughout trial) A Kentucky Supreme Court case suggests that under some circumstances it would approve a child victim's mother being allowed to testify despite being in the courtroom during her child's testimony. *Clark v. Com.*, 2008 WL 4692347 (Ky. 2008) (Unreported). "[T]he trial court should have made a finding under KRE 615 before allowing L.C.'s mother to remain in the courtroom during her testimony. Despite the trial court's failure to make these findings, we recognize that L.C. was severely distraught and fearful in testifying against her father during trial and that her mother's presence in the courtroom during her testimony may have been essential to the Commonwealth's presentation of its case. Thus, if on re-trial the trial court finds that L.C.'s mother fits into one of the KRE 615 exceptions, it would be proper for L.C.'s mother to stay in the courtroom during L.C.'s testimony." *Id.*
- b. **Constitutional right to attend criminal trial.** The 1<sup>st</sup> Amendment of the U.S. Const. and §11 Ky.Const. give both the defendant and the general public a constitutional right to demand admission of relatives, friends and the general public to all criminal trials. If the exclusion of a specific witness is not truly necessary to protect the integrity of the fact-finding process, the constitutional right of openness should prevail. Note: KRE 615(1) is unnecessary in a criminal case because §11 of the Ky. Const. entitles the defendant to meet the witnesses face to face. RCr 8.28 (1) mandates the defendant's presence "at every critical stage of the trial."
- c. **Commonwealth's agent is a "party."** A police officer exempted from separation is the Commonwealth's agent. His relevant out-of-court statements are exempted from the hearsay exclusionary rule. KRE 801A(b)(4). Relevant statements of such an officer can be introduced without any showing of inconsistency, and without a KRE 613(a) foundation. See under KRE 613(a) Admissions by a party (b).
- d. **Essential witness.** It is squarely within a trial court's discretion to determine if a witness is essential. *Hatfield v. Com.*, 250 S.W.3d 590, 594 (Ky. 2008) (citing *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky.2004)). Absent a demonstration that a witness is essential to the party's cause, "failure

## NOTES

- to separate witnesses may [nevertheless] be harmless error under the particular circumstances of the case.” *Id.* at 595. And, “[t]he mere threat or speculation that a witness could tailor testimony is not persuasive of its own accord to warrant prejudicial error.” *Id.* The Sixth Circuit, when interpreting FRE 615, which is identical in pertinent part to KRE 615, held that a party may request that two witnesses remain in the courtroom, one as a corporate representative and the other as a party essential to the party's cause. *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir.1991). See also **Child victim (a)**, and Expert witnesses (d).
- e. **Expert witnesses** are often exempted from exclusion and sit at counsel table or remain in the courtroom in order to testify based on observations made during trial. KRE 703(a) provides that an expert may base an opinion or inference on facts “perceived by or made known to the expert at or before the hearing.” A party wishing to excuse the expert from separation must obtain the judge’s permission under KRE 615(3) and should argue that the expert’s presence at trial is “essential to the presentation of the [defendant’s] cause.”
  - f. **Family members of victim, defendant.** See Penalty phase testimony (h).
  - g. **Outside the courtroom.** Witnesses who remain in the courtroom after their testimony, and are not recalled, did not violate this rule. *Johnson v. Com.*, 180 S.W.3d 494 (Ky.App. 2005). Nor did a defendant who spoke with a prospective witness during a recess violate the rule when he had not yet testified. *Smith v. Miller*, 127 S.W.3d 644 (Ky. 2004). Where witnesses allegedly engaged in collusion outside the courtroom, the remedy for the court was to question the witnesses and allow the witnesses' testimony to be “subject to proper impeachment on cross-examination. *Hall v. Com.*, 337 S.W.3d 595, 616 (Ky. 2011)
  - h. **Penalty phase testimony.** Trial courts have broad latitude to permit family members of the victim and the defendant, who have heard the guilt phase proceedings, to testify during the penalty phase in mitigation of the penalty or as a victim opposing leniency. *Swan v. Com.*, 384 S.W.3d 77, 96 (Ky. 2012). The application of KRE 615 to prohibit penalty phase testimony by witnesses who have observed the guilt phase “may be somewhat outmoded.” *McGuire v. Com.*, 368 S.W.3d 100, 113 (Ky. 2012) (finding no error in excluding testimony by defendant’s father when the issue was unpreserved and there was no avowal).
  - i. **Representative of “non-natural” party.** The prosecutor may designate a police officer under KRE 615(2) as the representative of the state to be exempted from a separation order. *Dillingham v. Com.*, 995 S.W.2d 377, 381 (Ky.1999); *Justice v. Com.*, 987 S.W.2d 306, 315 (Ky.1998). The Commonwealth is not a “natural person” and therefore an individual involved in the investigation may qualify as its officer or employee. The alleged victim of a crime cannot be designated as a representative. *Mills v. Com.*, 95 S. W. 3d 838 (Ky.2003); but *cf.*, *Hatfield v. Com.*, 250 S.W.3d 590 (Ky.2008) (witness who was victim’s grandfather could remain in courtroom as Com.’s representative, failure to make finding under 615(3) was harmless).
  - j. **Multiple representatives** may be allowed depending on the unique nature and complexity of the case, the vast time period of investigation, and the length and complexity of the trial. *Meece v. Com.*, 348 S.W.3d 627, 699 (Ky. 2011) *cert. denied*, 133 S. Ct. 105 (U.S. 2012).
  - k. **Sanctions.** The rule does not specify a sanction, but penalties can range from contempt for the one violating the separation order to prohibition of that witness’s testimony, in the discretion of the judge. *Smith v. Miller*, 127 S.W.3d 644 (Ky.2004) (reversing contempt order against prosecutor, because it found he did **not** violate the separation rule). See also, *Alexander v. Com.*, 220 S.W.3d 704 (Ky.App.2007) (a violation without prejudice entitles a party to no relief).

## Article VII. Opinion and Expert Testimony

## NOTES

### KRE 701

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

1. Rationally based on the perception of the witness; and
2. Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and
3. Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**HISTORY:** Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 34, eff. 7-1-92; 1990, c 88, § 49

**2007 Amendment.** Subsection (c) was added effective May 1, 2007. In cases tried prior to May 1, 2007, lay opinion is evaluated under the old rule. *Richards v. Com.*, 2007 WL 4462348, Fn. 3 (Ky.2007) (Unreported) (allowing lay footprint evidence, but suggesting it would *not* qualify under the amended rule). Note: recently the Court of Appeals reversed to allow a new trial to allow expert testimony on the ultimate issue --which was not allowed at the time of the original trial. *Sparks v. Com.*, 2012 WL 3136943 (Unreported) (Ky. App. 2012). *Sparks* appears to be wrongly decided.

### **DISCUSSION:**

KRE 701 rejects the common law presumption that lay opinion testimony is not admissible. Under KRE 701 lay opinion is admissible if the proponent can meet the requirements of the rule, and probative value is not substantially outweighed by potential to mislead the jury (KRE 403). The rule is "more inclusory than exclusory." *Clifford v. Com.*, 7 S.W.3d 371, 374 (Ky.1999).

### **THREE REQUIREMENTS for LAY OPINION:**

1. The proponent must show that the witness "perceived" facts or an event in such a way that the witness can draw a reasonable inference from it. Unlike an expert, a lay witness may not rely on hearsay or hypothetical premises. *Mondie v. Com.*, 158 S.W.3d 203 (Ky.2005); *Young v. Com.*, 50 S.W.3d 148 (Ky.2001).
2. Lay opinion must be "helpful" to determining a fact in issue or understanding the witness's testimony. "Helpfulness" is determined first by consideration of relevancy under KRE 401 and 402, *i.e.*, the opinion must bear on a matter of "consequence to the determination of the action." Also, the witness must be in a better position than the jurors to determine the issue. *Nellum v. Com.*, 2007 WL 2404485 (Ky.2007) (Unreported) (error to allow witness to opine defendant's face looked discolored, when jury could see for itself).
3. Lay opinion must pass the KRE 403 balancing test.

**Accident reconstruction.** Point of impact is not a topic of lay opinion. A police officer may testify about the point of impact only if qualified as an accident investigation expert, supporting his/her conclusions with physical evidence, disclosing those facts to the jury, and not basing his/her opinion on assumptions. *Alexander v. Swearer*, 642 S.W.2d 896, 897 (Ky.1982) (citations omitted). *Price v. Garcia*, 291 S.W.3d 728, 735 (Ky. App. 2009). See *Intruding on scientific*.

**African-American.** *Clifford v. Com.*, 7 S.W.3d 371, 374-75 (Ky. 1999) (allowing lay opinion that voice sounded like black male) (divided opinion).

**Age.** *Howard v. Kentucky Alcoholic Beverage Control Bd.*, 294 Ky. 429, 172 S.W.2d 46 (Ky. 1943) (permitting lay opinion on the age of a person), as cited in *Clifford v. Com.*, 7 S.W.3d 371, 374 (Ky. 1999).

**Alcohol, effects of.** A doctor may testify as to the effects of alcohol on the human body based on training. *Giles v. Com.*, 2009 WL 277049 (Ky. App. 2009) *aff'd*, 2010 WL 4156750 (Ky. Oct. 21, 2010) (Unreported).

**Biomechanics of injury.** Doctor did not stray outside his area of expertise despite viewing photographs of the accident, because he did not base his opinion upon the state of the car as it appeared in the pictures. *Combs v. Stortz*, 276 S.W.3d 282, 294 (Ky. App. 2009).

**Blood spatter.** A witness need not qualify as an expert to testify he observed blood spatter. *Payne v. Com.*, 2011 WL 4430860 (Ky. 2011) (Unreported) (witness testified only to existence of blood spatter, and his

## NOTES

only conclusion -that the blood belonged to X- was based on his perception that X was further into the house at the time of the assault); *Thompson v. Com.*, 147 S.W.3d 22 (Ky.2004) (case is not “superceded,” Westlaw is wrong); *cf.*, *Dougherty v. Com.*, 2006 WL 3386576, 1 (Ky.,2006) (Unreported) (finding reversible error in admitting sheriff deputy’s testimony on blood spatter without first qualifying him as an expert). To be safe, obtain a defense expert. See also Looks like... and Intruding on science...

**Child Sex Abuse Accommodation Syndrome (CSAAS).** Lay witnesses may not testify about a putative victim's behavioral changes to imply what the expert is forbidden from saying—that behavioral changes signify sexual abuse. *Blount v. Com.*, 392 S.W.3d 393, 395 (Ky. 2013) (admonition *sufficed* as only relief requested). Changes in a victim's behavior are admissible only if “germane to the determination of [a] fact of consequence to the case.” *Id.* *Cf.*, *Dickerson v. Com.*, 174 S.W.3d 451, 472 (Ky.2005) (evidence that A.H. visited a rape crisis center for treatment was relevant to prove that she was sexually assaulted). Evidence of a victim's emotional state following a sexual assault is permissible as proof that the assault occurred. *Dickerson v. Com.*, 174 S.W.3d 451, 472 (Ky. 2005)

**Collective Facts.** The “collective facts rule” permits a lay witness to state a conclusion or opinion on observed phenomena when there is no other feasible way to communicate the observation. *Fulcher v. Com.*, 149 S.W.3d 363, 372 (Ky.2004) (deputy sheriff “smelled ammonia”). Lay opinion regarding another person's state of mind must satisfy the collective facts rule, aka the “short hand rendition rule.” Based on her perceptions, a witness may express “an opinion about another's mental conditions and emotions....” *Gabbard v. Com.*, 297 S.W.3d 844, 855 (2009). Compare *McQueen v. Com.*, 339 S.W.3d 441, 449-450 (Ky. 2011) (witness with no perception of the shooting or the victim who did not observe the defendant before or immediately after the event had minimal knowledge of collective facts; his conclusion that the defendant’s demeanor indicated he accidentally shot the victim could not be adduced from his “perceptions without irrational leaps of logic.”

**Credibility of a witness.** Under KRE 608(a) and KRE 701 a witness may testify as to their opinion as to another witness’s truthfulness or untruthfulness. *Prior to its amendment in 2003, the rule limited* this sort of impeachment to reputation evidence. But see *Stewart v. Com.*, 197 S.W.3d 568 (Ky.App. 2006) (allowing mother’s opinion her child could lie). *Cf.*, *Moss v. Com.*, 949 S.W.2d 579, 583 (Ky. 1997), which holds that a witness may not testify to opinion that another witness is lying in this case.

**Crime scene videos.** See Narration.

**Demeanor of another.** *Caudill v. Com.*, 120 S.W.3d 635 (Ky.2004). Lay opinion is allowed on demeanor. *Fuller v. Com.*, 2009 WL 1452648 (Ky. 2009) (Unreported) (demeanor testimony that a child sex victim “became upset and guarded” at first was “minimal,” did not go to truthfulness & did not improperly bolster credibility). But compare *Ordway v. Com.*, 391 S.W.3d 762, 775-776 (Ky. 2013) (reversing due to admission of detective’s opinion that defendant’s conduct did not match the typical conduct of an innocent person acting in self-defense portrayed defense as a fabrication). See Collective facts, above.

**DUI tests.** Defense counsel argued that the use of the term “field sobriety tests” implied they were scientific tests, resulting in a violation of KRE 701. The court found that KRE 701 allowed the trooper to testify to his perception regarding how the defendant completed those tests. *Cox v. Com.*, 2012 WL 410835 (Ky. App. 2012) (Unreported) (appeal dismissed as interlocutory). See Intruding on scientific.

**Emotional reaction.** Eyewitness testimony describing defendant's apparent lack of reaction or surprise at death of his family was admissible. But precluding him from presenting expert psychological evidence to explain his observed lack of emotional reaction was reversible error. *McKinney v. Com.*, 60 S.W.3d 499 (Ky.2001) Evidence of a victim's emotional state following a sexual assault is permissible as proof that the assault occurred. *Dickerson v. Com.*, 174 S.W.3d 451, 472 (Ky. 2005).

**Experiment by lay witness.** A lay witness’ attempt to simulate the act of hitting the victim near the location of blood spatter did not bear a substantial similarity to the conditions under which the original assault occurred, but it was harmless error. *Payne v. Com.*, 2011 WL 4430860 (Ky. 2011) (Unreported).

**Foundation.** KRE 602 “refines the scope of permissible lay opinion testimony” under KRE 701 to include only “matters of which the witness has personal knowledge.” *Cuzick v. Com.*, 276 S.W.3d 260, 265 (Ky.2009). Under KRE 608(a) and KRE 701 a witness must be sufficiently acquainted with another witness to have formed a meaningful, experienced-based opinion of that witness's character for truthfulness or untruthfulness before he may testify to that opinion. *Cf. United States v. Whitmore*, 359 F.3d 609 (D.C.Cir.2004) (discussing the foundational requirements for reputation and opinion evidence under the very similar federal rules). When post-conviction counsel failed to establish that the witness trial counsel

## NOTES

failed to call had a proper basis for her lay opinion, the trial court was justified in finding no IAC. *Davis v. Com.*, 2007 WL 4292119 (Ky. App. 2007) (Unreported).

**Guilty or innocent.** Lay opinion is inadmissible as to guilt or innocence. *Ordway v. Com.*, 391 S.W.3d 762, 777 (Ky. 2013) (reversing for error in admission of police opinion that defendant acted like those who were fabricating a self-protection defense); *Meredith v. Com.*, 959 S.W.2d 87 (Ky.1997). Testimony that a defendant “acted guilty” was not appropriate when witness had no personal knowledge that defendant was guilty. *Martinez v. Com.*, 2009 WL 2706958 (Ky. 2009) (Unreported) (finding the error harmless). See also Witness calling another witness a liar.

**Handwriting.** Lay witness’s testimony rationally based on the perception of the witness “essentially pointed out differences in the signatures that the jury could observe for itself and judge whether any such differences indicated forgery when it examined the evidentiary exhibit of the challenged and unchallenged checks.” *Roach v. Com.*, 313 S.W.3d 101, 109 (Ky. 2010) (holding lay opinion was not error under *Hampton*, and if it was error, it was harmless); see *Hampton v. Com.*, 133 S.W.3d 438 (Ky.2004) (bank manager familiar with the valid signature was allowed to express lay opinion). See Intruding on scientific. See also KRE 702, Handwriting.

**Intoxication.** *Howard v. Kentucky Alcoholic Beverage Control Bd.*, 294 Ky. 429, 172 S.W.2d 46 (Ky. 1943) (permitting lay opinion on whether another person was intoxicated), as cited in *Clifford v. Com.*, 7 S.W.3d 371, 374 (Ky. 1999).

**Intruding on science or forensics.** In *Richards v. Com.*, 2007 WL 4462348 (Ky. 2007) (Unreported) a lay witness opined muddy shoeprints were from the defendant. The Court found this harmless because the officer admitted he was no expert and said the crime lab couldn’t conclude the prints were from defendant. “More importantly, any prejudicial effect could have been cured by an admonition.” *Id.* Note: This trial occurred before the addition of 701(c) forbidding lay witness from offering opinion on scientific or forensic matters, & pre-2007 rules applied.

**Law, legal opinion or conclusion.** A lay witness may not offer a legal opinion or conclusion of law, or testify as to what the law is. *Wyatt v. Com.*, 219 S.W.3d 751, 758 (Ky. 2007) (reversible error in allowing questioning witness whether solicitation to commit murder requires completion of payment). *Tamme v. Com.*, 973 S.W.2d 13, 32 (Ky.1998); see also *Whaley v. Com.*, 2011 WL 1642191 (Ky. 2011) (Unreported) (upholding exclusion of inquiry whether defendant acted in self-defense) and *Alexander v. Com.*, 2009 WL 428301 (Ky. 2009) (Unreported) (upholding exclusion of question asking the victim to compare a prior rape allegation with the instant charge, as it would require witness’ conclusion whether the current attack was a rape). Note: the *Whaley* Court suggests the defense could have instead asked the witness about his “fact-based impressions whether the defendant might have perceived a threat from the victim” (see Collective facts).

**“Looks like....”** *Crowe v. Com.*, 38 S.W.3d 379 (Ky.2001) (“it looked like blood” was admissible lay opinion). A juice bottle “looked like” a silencer. *Hunt v. Com.*, 304 S.W.3d 15, 35 (Ky. 2009) (based on officer’s experience he could testify it “looked like” a silencer). See also, *Mondie v. Com.*, 158 S.W.3d 203, 211 (Ky. 2005), approving lay opinion by officer that shell casings from a semi-automatic weapon were too close together to have landed where they did by being fired). *McQueary v. Com.*, 2008 WL 2065243 (Ky. App. 2008) (Unreported) (no error admitting officer testimony it appeared to be an “inside job,” explaining how the officer came to suspect the defendant).

**Mental state of another.** See Collective facts.

**Narration of recordings.** Narrative-style testimony of audio and video evidence must comport with the rules of evidence. *Cuzick v. Com.*, 276 S.W.3d 260, 265-266 (Ky. 2009) (holding narrative of high-speed chase video was not palpable error because not “interpretive” but instead was “explicative of the officers’ perception of the events occurring on the video”); *Mills v. Com.*, 996 S.W.2d 473 (Ky. 1999) *overruled on other grounds by Padgett v. Com.*, 312 S.W.3d 336 (Ky. 2010) (police officer’s lay narrative of crime scene video). Lay opinion contained in narrative testimony must comply with KRE 701 and KRE 602. KRE 602 requires the witness to have personal knowledge. KRE 701 requires narration of a video to be based on the officer’s personal knowledge and to be helpful to the jury in evaluating the images displayed. *Mills*, 996 S.W.2d at 488; see also, *Milburn v. Com.*, 788 S.W.2d 253, 257 (Ky.1989) (approving “simultaneous commentary” of crime scene video); cf. *Fields v. Com.*, 12 S.W.3d 275, 280 (Ky.2000) (finding error in pre-recorded narrative video when such narration contained inadmissible hearsay) and *Gordon v. Com.*, 916 S.W.2d 176, 180 (Ky.1995) (finding error when witness was allowed to interpret inaudible audio tape of drug buy instead of testifying as to his recollection).

## NOTES

**Opening the door.** A party who first introduces incompetent evidence cannot complain of the subsequent admission of like evidence from the adverse party. *Claxton v. Com.*, 2008 WL 5191192 (Ky. App. 2008) (Unreported) (officer permitted to give lay opinion that injuries were too severe to have been caused by a fall). “If counsel had not asked about the causation of the injuries to [victim’s] legs, then the Commonwealth may not have been permitted to ask about the causation of the injuries to [victim’s] face.” *Id.*

**Police opinion.** *Allgeier v. Com.*, 915 S.W.2d 745 (Ky.1996) (allowing police officer's opinion based on training and experience whether there was evidence of forced entry); *Sargent v. Com.*, 813 S.W.2d 801, 802 (Ky.1991) (officers can render opinions that possession of fifteen pounds of marijuana was for the purpose of sale, not personal use); *Lanham v. Com.*, 171 S.W.3d 14, 23 (Ky.2005) (police officer’s questions in taped interview of witness expressing disbelief of defendant were mere “context,” & prejudice curable by admonition). The “context” theory was upheld in *Wesner v. Com.*, 2012 WL 3636928 (Ky. 2012) (Unreported). But *cf.*, *Davis v. Com.*, 2012 WL 5289407 (Ky. 2012) (Unreported) (allowing a detective to explain she was lying to the defendant in a taped interview (when she said she believed [part of his defense]) was error under KRE 403 because it permitted her to testify that she thought another witness was lying. The error was found harmless, because Davis “opened the door.” See also Guilty or innocent.

**Property value.** A properly qualified lay witness may render an opinion regarding the value of property. *Com., Department of Highways v. Slusher*, 371 S.W.2d 851, 853 (Ky.1963) (lay witness must “know the property to be valued and the value of the property in the vicinity, must understand the standard of value, and must have ability to make a reasonable inference). In *Baltimore & O.R. Co. v. Carrier*, 426 S.W.2d 938, 941 (Ky.1968) the trial court erred by refusing to allow expert testimony on damages to a dump truck. KRE 701 does not distinguish between real or personal property as a basis for lay opinion.

**Sanity of another.** *Brown v. Com.*, 934 S.W.2d 242, 248 (Ky.1996) (opinion admissible).

**Shell casings, silencer.** See Looks like...

**Short hand rendition rule.** See Collective facts.

**Smell of gasoline.** *King v. Ohio Valley Fire & Marine Ins. Co.*, 212 Ky. 770, 280 S.W. 127 (Ky. 1926) (permitting lay opinion), as cited in *Clifford v. Com.*, 7 S.W.3d 371, 374-75 (Ky. 1999).

**Speed of moving vehicle.** *Clement Bros. Constr. Co. v. Moore*, 314 S.W.2d 526 (Ky.1958) (permitting lay opinion), as cited in *Clifford v. Com.*, 7 S.W.3d 371, 375 (Ky. 1999).

**Suffering, degree of.** *Zogg v. O'Bryan*, 314 Ky. 821, 237 S.W.2d 511 (Ky. 1951) (allowing lay opinion on the degree of *physical* suffering endured by another), as cited in *Clifford v. Com.*, 7 S.W.3d 371, 374-75 (Ky. 1999).

**Technology, telephone features.** Non-expert testimony about telephone features such as “star 67” or “star 69” is allowed so long as the witness has personal knowledge of the feature and how it works. Such testimony is not “opinion or inference.” A lay witness can testify that the call was a star-67 call and that star-67 prevented the caller's phone number from showing up on caller-ID. *Bratcher v. Com.* 151 S.W.3d 332, 355 -356 (Ky.2004).

**Texting, source of.** Lay opinion testimony that witness believed she was texting back and forth with defendant was rationally based on her perceptions, not of a scientific nature, and relevant to a determination of whether defendant had illegal sexual contact with her. *Long v. Com.*, 2011 WL 6826377 (Ky. 2011) (Unreported).

**Ultimate issue.** A lay witness may testify to an opinion on an ultimate issue. *McKinney v. Com.*, 60 S.W.3d 499, 504 (Ky.2001); *Stringer v. Com.*, 956 S.W.2d 883, 889 (Ky.1997). (“The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’” But see Guilt, innocence.

**Witness calling other witness liar.** A witness should not be asked to characterize the testimony of another witness as a lie. *Moss v. Com.*, 949 S.W.2d 579, 583 (Ky. 1997); See also *Hall v. Com.*, 337 S.W.3d 595, 602–03 (Ky.2011). The veracity of another witness may be relevant. But this question solicits an opinion no witness is qualified to give, an opinion unhelpful to the jury, inadmissible under KRE 701. See also KRE 607, 608 and 609, regarding attacks on witness credibility. See Police opinion.

**Witness interviews.** See Police opinion.

**KRE 702**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

**HISTORY:** Amended by Supreme Court Order 2007-02, eff. 5-1-07 to add three conditions: “if (1) ..., (2) ..., and (3) ....” The purpose of the amendment is to confirm the trial court’s role as “gatekeeper.” See, e.g., Advisory Committee Note to 2000 Amendments to Fed.R.Evid. 702. 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 50.

**DISCUSSION:**

All expert opinion is ruled by KRE 702, not just scientific opinion. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). But to qualify under KRE 702 --which allows hearsay and hypotheticals -- the area of knowledge must be scientific, technical, or otherwise specialized. Non-scientific, non-technical opinion is covered by KRE 701. KRE 702 applies when *doubt* is raised as to reliability of scientific or technical opinion evidence. Counsel may raise doubt about any area of knowledge, including long-accepted areas. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 fn. 11 (1993). Under *Johnson v. Com.*, 12 S.W.3d 258 (Ky.1999) if an area is already established as reliable, no inquiry is necessary. As to such an area, the burden shifts to the opponent of the evidence to establish by a preponderance that it is unreliable. Reliability under KRE 702 is a sub-set of KRE 104(a) reliability, and “*Daubert* hearings” are also called “KRE 104(a) hearings.”

**KRE 702 – line by line –****“If scientific, technical, or other specialized knowledge...”**

Opinion must be related to scientific, technical, or “other specialized” knowledge before Rule 702 allows a witness to testify as an “expert.” See Scientific, technical, or otherwise specialized, below.

**“...will assist the trier of fact to understand the evidence or to determine a fact in issue...”**

Expert testimony won’t assist the judge or jury unless it is limited to subjects the average person doesn’t already know about. *Dixon v. Com.*, 149 S.W.3d 426 (Ky.2004). See Assist the trier of fact.

**“...a witness qualified as an expert by knowledge, skill, experience, training, or education... ”**

An expert witness must be qualified based on knowledge, practice, skill, experience, long observation, training or education. There are many ways to qualify. See Qualified as expert.

**“...may testify thereto in the form of an opinion or otherwise...”**

An expert may testify to his or her opinion or simply provide information to assist the trier of fact in understanding a little-known scientific or technical area. See Form of opinion.

**“...if (1) the testimony is based upon sufficient facts or data...”**

A qualified expert may base testimony on perceptions (like a fact witness), on matters observed in court, on hearsay, and/or on hypotheticals. But expert testimony must have an adequate basis of facts or data in the record. See Basis of opinion and see KRE 703.

**“...[if] (2) the testimony is the product of reliable principles and methods,”**

Expert opinion must be based on reliable principles and methods. If a scientific or technical method is unproved, or there’s some question about it, the judge must hold a *Daubert* hearing, or at least an inquiry. See *Daubert hearing*, and *Daubert* factors.

**“...[and if] (3) the witness has applied the principles and methods reliably to the facts of the case.”**

The opinion or testimony of an expert who has done a poor job *in this case* may be excluded no matter how qualified the expert may be. See Performance of expert in this case.

**Accident reconstruction.** Though not listed in *Johnson v. Com.*, 12 S.W.3d 258 (Ky.1999), accident reconstruction is generally unquestioned as a legitimate area of specialized knowledge. Not much is required in terms of experience, training or basis in order to opine. *Allgeier v. Com.*, 915 S.W.2d 745, 747 (Ky.1996) (police officer who was not qualified as a reconstructionist allowed to give an opinion); *Coulthard*

## NOTES

## NOTES

*v. Com.*, 230 S.W.3d 572, 582 (Ky.2007) (accident reconstructionist allowed to state the cause of an accident based on his review of nothing more than a photo of the vehicle).

**Appellate standard of review** Reliability determinations are reviewed for clear error. *Coulthard v. Com.*, 230 S.W.3d 572, 581 (Ky. 2007), citing, *Miller v. Eldridge*, 146 S.W.3d 909, 916 (Ky.2004). Because reliability is a preliminary question of fact reserved to the trial judge, clear error, not abuse of discretion, is the appropriate standard of review. *Miller v. Eldridge*, 146 S.W.3d 909, 916 (Ky. 2004), citing, KRE 104(a) and Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK § 6.20[6], at 456 (4th ed.2003). A reliability ruling will be upheld if it is supported by substantial evidence, *Miller v. Eldridge*, 146 S.W.3d 909, 917 (Ky.2004).

**Assist the trier of fact.** Expert testimony is limited to subjects the average juror doesn't know much about. *Dixon v. Com.*, 149 S.W.3d 426 (Ky.2004). The core concept is assistance to the fact-finder that doesn't waste time (KRE 403). In *Tucker v. Women's Care Physicians of Louisville, P.S.C.*, 381 S.W.3d 272, 277 (Ky. 2012) expert testimony regarding the meaning of a doctor's order was properly excluded because the order was not ambiguous to his nurse, and thus what it meant to an expert did not matter; cf., *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 396 (Ky. 2010) (the jury did need expert testimony to determine whether the emergency room entrance was safe).

**Anatomy, musculoskeletal.** Because Dr. Emily Craig has a great deal of training, education, and experience in musculoskeletal anatomy (not just in forensic anthropology) she was found qualified to render an opinion on the cause and nature of musculoskeletal injuries. *Wesner v. Com.*, 2012 WL 3636928 (Ky. 2012) (Unreported).

**Arson.** Arson investigation is junk science. Modern *Scientific Evidence*, Faigman et al., 2007-2008, Vol. 5, Chapter 38 on Fires, Arsons and Explosions. Several courts have thrown out arson expert opinion. *Pride v. BIC Corp.*, 218 F.3d 566 (6th Cir. 2000) (methods of arson experts were inadequate to support their conclusions); *Weisgram v. Marley*, 169 F.3d 514 (8th Cir. 1999), aff'd, 528 U.S. 440 (2000) (arson experts unqualified to opine re: cause of fire); *Comer v. American Electric Power*, 63 F.Supp.2d 927 (N.D.Ind. 1999) (expert's personal knowledge was speculation); cf., *Yell v. Com.*, 242 S.W.3d 341(Ky.2007) (unsuccessful challenge to arson sniffer dog). Conclusions about "V-patterns" and "low burns" are included in the LEAA 1977 list of discredited myths about arson. *Modern Scientific Evidence*, Vol. 5, § 38.30, p. 126. Concluding that there are multiple origins of a fire because there are multiple V-patterns is reliable only when the fire is extinguished prior to "total room involvement." Once a fire has reached "flash point," items near the top of the room catch fire and fall down, causing secondary ignitions, and additional V-shaped burn patterns. *Modern Scientific Evidence*, § 38.31, p. 127.

**Articles.** See Basis of opinion and KRE 703.

**Ballistics.** Trial courts may take judicial notice that ballistics is a reliable forensic science. *Johnson v. Com.*, 12 S.W.3d 258, 262 (Ky.1999) (dicta). But ballistics is under fire. The FBI discontinued Comparative Bullet Lead Analysis (CBLA) testing in September of 2005. Since "the FBI Laboratory that produced the CBLA evidence now considers such evidence to be of insufficient reliability... a finding [to the contrary] would be clearly erroneous...." *Ragland v. Com.*, 191 S.W.3d 569, 580 (Ky.2006). Ballistics experts continue to assert, as do their manuals and literature, that "scientific principles" underlie the field. But they cannot identify those principles, which consist of no more than elementary principles of physics that govern the transfer of impressions to a bullet and casing when a gun is fired. *U.S. v. Glynn*, 578 F.Supp. 567, 570 (S.D.N.Y.2008). Press ballistics experts on cross-exam to admit what they do is largely subjective, and a different examiner might see the lands and grooves, for instance, differently. Good arguments can be made to limit the degree of certainty that a ballistics expert is allowed to claim. *U. S. v. Monteiro*, 407 F.Supp.2d 351, 355 (D.Mass.2006) (no current reliable scientific methodology permits testimony that a casing and a particular firearm 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty).

**Basis of opinion.** Expert testimony must have a sufficient basis *in the record* for appellate review. *Com. v. Christie*, 98 S.W.3d 485, 488-89 (Ky.2002). After an adequate hearing or inquiry, the court must establish on the record the basis for admission or exclusion. *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky.2004). The record must demonstrate that the court had an adequate basis for making its decision. The record should contain, e.g., "proposed expert's reports, affidavits, deposition testimony, and existing precedent." *Christie*, 98 S.W.3d at 488-89. See also Literature-review as basis of opinion.

**Biomechanics.** Generally it is improper for a physician to testify as to the biomechanics of an accident. *Combs v. Stortz*, 276 S.W.3d 282, 294 (Ky. App. 2009) (no evidence doctor based his opinion on state of the car as it appeared in accident photos); *Tetrick v. Frashure*, 119 S.W.3d 89 (Ky.App.2003). See also, *West*



v. *KKI, LLC*, 300 S.W.3d 184 (Ky. App. 2008) (amusement park safety expert's testimony was inadmissible lacked expertise in biomechanics and Dr. George Nichols' expertise in biomechanics was not "broad" enough).

**Bite marks.** In *Wheeler v. Com.*, 121 S.W.3d 173, 183 (Ky.2004), the Court held that a physician –through medical training--was qualified to testify that an injury on the defendant's arm was not a bite mark. But see *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (bite-mark evidence is so unreliable and prejudicial that it violates due process).

**Blood spatter** A witness may be qualified by training and "on-the-scene observations" to testify about blood spatter at a crime scene. *Wheeler v. Com.*, 121 S.W.3d 173, 183 (Ky.2004) (doctor testimony); *Woodall v. Com.*, 63 S.W.3d 104 (Ky.2001) (allowing a serologist's testimony that a bloodstain was made by the victim's face). A witness need not qualify as an expert to testify about mere observation of blood spatters. *Payne v. Com.*, 2011 WL 4430860 (Ky. 2011) (Unreported) (witness testified only to the existence of blood spatter and did not offer any opinions; his opinion that the blood belonged to X was based on his perception that X was further into the house than Y at the time of the assault). But cf., *Dougherty v. Com.*, 2006 WL 3386576, 1 (Ky.2006) (Unreported) (finding reversible error in admitting sheriff deputy's testimony on blood spatter without first qualifying him as an expert witness).

**Blood tests, presumptive.** Expert testimony based on presumptive blood tests lacks scientific reliability, lacks probative value, is irrelevant, and prejudicial. *State v. Kelly*, 770 A.2d 908 (Conn. 2001). Even though presumptive luminol blood tests have been tested, peer reviewed, and generally accepted as an investigative tool, they are nevertheless per se too unreliable to be admissible at trial. *State v. Moody*, 573 A.2d 716, 722-723 (Conn. 1990). But beware, and cf., *Murphy v. Com.*, 2008 WL 1850626, 3 (Ky.2008) (Unreported) (upholding introduction of presumptive blood test results, stating that deficiencies in "this type of evidence" go to weight, not admissibility).

**Breath tests.** Results of a *preliminary* breath test (PBT) are "clearly inadmissible to prove guilt or for sentencing purposes." The pass/fail result of a PBT is (only) admissible for the limited purpose of establishing probable cause for an arrest at a hearing on a motion to suppress. *Greene v. Com.*, 244 S.W.3d 128, 134 -135 (Ky.App.2008) Courts may take judicial notice that (non-preliminary) breath testing is a reliable science. *Johnson v. Com.*, 12 S.W.3d 258, 262 (Ky.1999) But cf., *Com. v. Davis*, 25 S.W.3d 106 (Ky.2000) (breath tests admissible if machinery was "properly checked and in proper working order at the time of conducting the test.").

**Breathalyzer, "BAC," "Intoxilyzer" breath tests (non-preliminary).** The evidence necessary to lay a proper foundation for admission of a breath test at trial:

1. That the machine was properly checked and in proper working order at the time of conducting the test.
2. That the test consisted of the steps and the sequence set forth in 500 KAR 8:030(2).
3. That the certified operator had continuous control of the person by present sense impression for at least twenty minutes prior to the test and that during the twenty minute period the subject did not have oral or nasal intake of substances which will affect the test.
4. That the test was given by an operator who is properly trained and certified to operate the machine.
5. That the test was performed in accordance with standard operating procedures.

*Com. v. Roberts*, 122 S.W.3d 524, 528 (Ky.2003).

The 500 KAR 8:030 § 1(2) five sequential steps: (a) Ambient air analysis; (b) Alcohol simulator analysis; (c) Ambient air analysis; (d) Subject breath sample analysis; and (e) Ambient air analysis. When all five are reflected on the test ticket printout, a proper foundation for the admission of the BAC test results has been laid. *Lewis v. Com.*, 217 S.W.3d 875, 877 (Ky.App.2007).

**Burn injuries.** Despite complete failure to satisfy even one *Daubert* factor, Dr. Betty Spivack's opinion that certain injuries were caused by a BIC lighter was admissible because it was supported by two "published case reports" documenting burns inflicted by cigarette lighters and upon her own experience, i.e., she had seen "two cases" involving the same type of burns where there had been an admission that a cigarette lighter was used. *Ratliff v. Com.*, 194 S.W.3d 258 (Ky.2006). Experience-based expertise should require more basis than this. Get a counter-expert.

**Canine scent tracking** – see Dogs.

## NOTES

**Causation- Medical.** Medical testimony about causation of injury must qualify under *Daubert*. *City of Owensboro v. Adams*, 136 S.W.3d 446, 450-451 (Ky.2004). Medical causation must be proved to a reasonable medical probability. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky.2004), but *perhaps* not to a scientific certainty:

*Daubert* does not require proof to a scientific certainty, or even proof convincing to the trial judge. The trial judge is not required to find that the proffered opinion is scientifically correct, but only that it is trustworthy because it is tied to good scientific grounds. What *Daubert* does require is that the expert's opinion be based on sound methodologies of the type used by experts in the field in which the opinion is offered. There can be little question that scientists routinely use animal studies, case reports, and pharmacological comparisons of similar classes of drugs to infer conclusions, which are expressed in peer-reviewed journals and textbooks. Unquestionably, epidemiological studies provide the best proof of the general association of a particular substance with particular effects, but it is not the only scientific basis on which those effects can be predicted. In science, as in life, where there is smoke, fire can be inferred, subject to debate and further testing.

*Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 105 (Ky. 2008), quoting *Brasher v. Sandoz Pharmaceuticals Corporation*, 160 F.Supp.2d 1291,1296 (N.D.Ala.2001) (emphasis added).

**Child Sex Abuse Accommodation Syndrome (CSAAS).** Admission of “expert” child sexual abuse accommodation syndrome (CSAAS) testimony is reversible error. *Sanderson v. Com.*, 291 S.W.3d 610 (Ky. 2009); see also, *R.C. v. Com.*, 101 S.W.3d 897 (Ky.App.2002) (social worker’s opinion that a child exhibited signs of sex abuse was inadmissible); *Miller v. Com.*, 77 S.W.3d 566 (Ky.2002) (testimony by police sergeant that in 90% of the cases she investigated, there was a delay between the sexual abuse and the child’s report of the sexual abuse, was improper evidence of the habits of others).

**Note: Lay witnesses** may not testify about a putative victim's behavioral changes to imply what the expert is forbidden from saying directly—that behavioral changes signify sexual abuse. *Blount v. Com.*, 392 S.W.3d 393, 395 (Ky. 2013). See KRE 701, note on CSAAS. But they may testify that an alleged victim acted upset after the time of the alleged abuse. See Emotional reaction.

**Child interview techniques.** Expert testimony that a witness was subjected to suggestive interview techniques pertains to the *reliability* or *accuracy* of the witness's belief or recollection, not to the truthfulness or untruthfulness of the witness. *Jenkins v. Com.*, 308 S.W.3d 704, 711 (Ky. 2010) (reversing and remanding due to error in refusing to allow expert testimony on improper or suggestive questioning of children). The tapes of the questioned interviews were admissible to show the improper questioning. *Id.*

**Computer Generated Visual Evidence (CGVE).** Computer-generated visuals that merely illustrate testimony are admissible if they are fair and accurate representations. *Gosser v. Com.*, 31 S.W.3d 897, 902 (Ky.2000), *abrogated on other grounds by Winstead v. Com.*, 283 S.W.3d 678 (Ky. 2009). But visuals that purport to be scale models, or simulations require more to meet *Daubert*: *i.e.*, testimony concerning the development, testing, error rate, acceptance of the program by others in the field and the peer review of the computer simulation methodology. *Id.*, citing, *Livingston v. Isuzu Motors, Ltd.*, 910 F.Supp. 1473, 1494-95 (D.Mont.1995).

**Crime scene reconstruction, re-enactment.** In *Woodall v. Com.*, 63 S.W.3d 104 (Ky.2001) serologist testimony concerning crime re-enactment was admissible. But in *Price v. Com.*, 59 S.W.3d 878 (Ky.2001) reenactment of a crime during closing argument, with victim’s participation, was improper, but harmless. In another case, reconstruction expert testimony was held reliable despite lack of documentation and analysis generally performed in a formal accident reconstruction. *Coulthard v. Com.*, 230 S.W.3d 572, 582 (Ky.2007). Empirical models may be excluded. *Cf. Wilhite v. Rockwell Intern Corp.*, 83 S.W.3d 516 (Ky.2002) (exclusion of empirical model constructed especially for this case and untested in any other forum).

**Cross-exam and impeachment.** Presentation of contrary opinion by a defense expert is an effective weapon. The weaknesses of an expert's testimony are subject to cross-examination. *Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 576 (Ky. App. 2011); *Com. v. Martin*, 290 S.W.3d 59, 69 (Ky.App.2008); *U.S. v. L.E. Cooke Co., Inc.*, 991 F.2d 336, 342 (6th Cir.1993). An expert is subject to all forms of impeachment. See, KRE 607 and 608. *Miller v. Marymount Medical Center*, 125 S.W.3d 281 (Ky.2004) (approving asking expert re: compensation). Use transcripts of prior testimony. An expert may be impeached by prior inconsistent statements, contradicted by the testimony of another expert, or by the learned treatise method. KRE

## NOTES

803(18).<sup>1</sup> You can question the reliability of the expert, the expert's field, the expert's performance in the instant case, and reliability of any matter relied on, i.e., the individual pieces of *supporting* evidence.

**Counterfeit money.** A counterfeit money expert was allowed to testify that the counterfeit bills in defendant's possession could not have been glued together with a glue stick. *Boyd v. Com.*, 357 S.W.3d 216, 222 (Ky. App. 2011). Any lack of specialized training on the part of the detective concerning glue only went to the weight of his testimony, not his qualification as an expert or the competency of his testimony. *Id.* at 333-332.

**Daubert factors.** There are five *Daubert* factors:

1) whether a theory or technique can be and has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) whether there is a high known or potential rate of error; 4) whether there are standards controlling the technique's operation; and 5) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

*Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578-79 (Ky.2000) (citing *Daubert*, 509 U.S. at 592-94).

The Kentucky Supreme Court has said it may be error to rely "too heavily" on the *Daubert* factors, which "may or may not be pertinent in assessing reliability depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Miller v. Eldridge*, 146 S.W.3d 909, 918-919 (Ky.2004). The list is not binding, and other factors of a court's choosing may be considered. *Kumho Tire*, 526 U.S. at 150; *Brown-Forman Corporation v. Upchurch*, 127 S.W.3d 615, 621 (Ky.2004). It is possible that none of the *Daubert* factors may apply. Where testimony describes the "manifest characteristics of a particular subject" and does not involve theories, processes, or methods of novel or controversial origin, "actual experience and long observation" may be sufficient. *Kurtz v. Com.*, 172 S.W.3d 409, 412 (Ky.2005) (child memory expert allowed to rely on extensive experience). Insist on long observation as a basis for experience-based opinion. *Cf.*, *Ratliff v. Com.*, 194 S.W.3d 258 (Ky.2006) (child abuse expert allowed to opine based on reading "some" periodicals and observing two cases).

**Daubert hearing.** To satisfy *Daubert*, a trial court may conduct a formal KRE 104(a) hearing and enter findings of fact and conclusions of law. *See Com. v. Christie*, 98 S.W.3d 485, 488-89 (Ky.2002). A trial court may also opt for a less formal "inquiry" as long as the record is complete enough, i.e., if it includes the proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like. *Id.* [quoting *Jahn v. Equine Services, P.S.C.*, 233 F.3d 382, 393 (6th Cir.2000)]. No *Daubert* inquiry need be conducted when the defendant *agrees* to admissibility. *Roark v. Com.*, 90 S.W.3d 24 (Ky.2002). If the subject matter has already been held reliable by a published Kentucky appellate decision, the court may hold a *Daubert* hearing, or not, in its discretion. *Johnson v. Com.*, 12 S.W.3d 258 (Ky.1999). Some of the areas judicially noticed in *Johnson* are suspect, including microscopic hair analysis and preliminary breath tests.

The "central inquiry" is "an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Toyota Motor Corporation v. Gregory*, 136 S.W.3d 35, 39 (Ky.2004). This assessment should be made according to the four-part *Stringer* test. First, the witness must be qualified to render an opinion on the subject matter. Second, the subject matter must satisfy the requirements of *Daubert*. Third, the subject matter must satisfy the test of relevancy set forth in KRE 401, subject to balancing under KRE 403. Finally, the opinion testimony must assist the trier of fact. *Stringer v. Com.*, 956 S.W.2d 883, 891 (Ky.1997). See *Daubert* factors.

**Burden of proof** The burden of proof at a *Daubert* hearing is on the proponent of the evidence to establish reliability by a preponderance. *Daubert*, 509 U.S. at 593, fn. 10. In cases involving accepted areas of knowledge, Kentucky shifts this burden to the objecting party to prove by a preponderance that the theory or opinion is no longer reliable. *Johnson v. Com.*, 12 S.W.3d 258 (Ky.1999). This conflicts with fn. 10 in *Daubert*, which makes no allowance for burden-shifting.

**Findings of fact** The trial court must affirmatively state on the record that it has reviewed the material submitted by the parties relating to the testimony of the experts and concluded that the testimony is reliable. This is the minimum required for a *Daubert* ruling. *Hyman & Armstrong, P.S.C. v. Gunderson*, 279

<sup>1</sup> KRE 803(18) Learned treatises. To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

## NOTES

S.W.3d 93, 101 (Ky. 2008), *citing*, *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky.2004). To allow expert testimony without a sufficient basis in the record is an abuse of discretion. *Com. v. Christie*, 98 S.W.3d 485, 488-89 (Ky.2002). [See Appellate standard of review, explaining that correct standard is clear error.]

**Conclusions of law** A trial court “need not recite any of the *Daubert* factors, so long as the record is clear that the court effectively conducted a *Daubert* inquiry.” *Miller v. Eldridge*, 146 S.W.3d 909, 921-22 (Ky.2004).

**Defense expert.** A trial court ruling that because the defense had an expert, the Commonwealth could have one too was not supported by sound legal principles. *Burton v. Com.*, 300 S.W.3d 126, 141 (Ky. 2009). See Cross exam, impeachment.

**Discovery.** RCr 7.24(1) requiring a defendant to make available expert reports intended to be introduced or prepared by the expert defendant intends to call does not require a defendant's expert to generate a report for the Commonwealth. *Com. v. Nichols*, 280 S.W.3d 39 (Ky. 2009). Defendant is not required to disclose that his DNA expert intends, at trial, to criticize the methodology used by Commonwealth's DNA expert. *Jones v. Com.*, 237 S.W.3d 153 (Ky. 2007).

**Differential diagnosis** Differential diagnosis, well-recognized and widely-used, calls for listing the known possible causes of a disease and eliminating causes until left with the one most likely. *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 107 (Ky. 2008) (holding that differential diagnosis is admissible and has been accepted by many courts as reliable). *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir.1998); *Glaser v. Thompson Med. Co., Inc.*, 32 F.3d 969 (6th Cir.1994); *Perkins v. Origin Medsystems, Inc.*, 299 F.Supp.2d 45 (D.Conn.2004).

**DNA.** DNA represents the gold standard of genetic identification. See, e.g., *Fugate v. Com.*, 993 S.W.2d 931, 936-937 (Ky.1999) (holding that DNA evidence is so reliable that it is admissible per se without a *Daubert* inquiry). DNA evidence is so persuasive that prosecutors cannot be allowed to misstate or misuse it. *Duncan v. Com.*, 322 S.W.3d 81 (Ky. 2010) (reversing due to prosecutor's suggestion on cross examination that DNA results had to be wrong for defendant's version of events to be right, when expert had said the DNA could be from any number of sources).

**DNA frequency statistics.** In *Hamm v. Com.*, 2010 WL 1006279 (Ky. 2010) (Unreported) the Court relied on language in *Fugate v. Com.*, 993 S.W.2d 931, 935 (Ky.1999) to uphold a trial court decision to allow a forensic biologist to note that a DNA sample from a toboggan matched the defendant's DNA standard “at all locations” with an estimated frequency of one person in 590 trillion based on relevant U.S. populations. The biologist's lack of a statistics degree was “not fatal.” The *Hamm* Court cited *Fugate*, 993 S.W.2d at 935: (“[A]n individual can be qualified as an expert without possessing a particular academic degree.”). The biologist in *Hamm* had “several statistics classes and workshops. Additionally, during his training he was required to prepare the statistics of multiple DNA samples by hand.”

**Dogs, sniffer.** “If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs.” *Florida v. Harris*, 133 S.Ct. 1050, 1057 (2013).

Note: Kentucky's 115-year-old *Pedigo* test is more stringent than the *Harris* test. *Pedigo* requires a proper foundation to include 1) the dog's scent tracking record; 2) the qualifications of its handler, and 3) the dog's training and history. *Debruler v. Com.*, 231 S.W.3d 752, 756 (Ky., 2007), *citing*, *Pedigo v. Com.*, 103 Ky. 41, 44 S.W. 143 (Ky. 1898). If the *Pedigo* foundation is met, a sniffer dog's “alerts” are so reliable they may be allowed despite negative lab results. *Yell v. Com.*, 242 S.W.3d 331 (Ky.2007). Presumably Kentucky will continue to apply the *Pedigo* test. Also presumably the test for reliability will be the same regardless what scent the dog is trained to track or detect. *Debruler* involved dogs tracking a human suspect. *Yell* involved an arson sniffer dog.

**Drugs, evidence of sales.** Police narcotics officers may testify that possession of drugs in a particular amount usually indicates the purposes of sale rather than personal use. *Sargent v. Com.*, 813 S.W.2d 801, 802 (Ky.1991); *Kroth v. Com.*, 737 S.W.2d 680, 681 (Ky.1987). In *Dixon v. Com.*, 149 S.W.3d 426, 430 (Ky.2004). a narcotics officer testified as to the meaning of notes thought to be an account of drug transactions and money amounts.

## NOTES

**Drug recognition testimony.** Unqualified testimony by a police training instructor comparing a twelve-step drug recognition protocol with testimony by paramedics and hospital findings invited the jury to speculate that the defendant could have been under the influence of LSD, ecstasy, and methamphetamine—all illicit substances of which there was no evidence. *Burton v. Com.*, 300 S.W.3d 126, 141 (Ky. 2009) (acknowledging that drug recognition testimony would be admissible if it were based upon personal observation, examination, and testing).

**Drug test results.** See Urinalysis.

**Emotional reaction.** Evidence of a victim's emotional state following a sexual assault is permissible as proof that the assault occurred. *Dickerson v. Com.*, 174 S.W.3d 451, 472 (Ky. 2005). Trial court ruling excluding defense expert psychological evidence to explain defendant's observed lack of emotional reaction was prejudicial and amounted to reversible error. *McKinney v. Com.*, 60 S.W.3d 499 (Ky.2001).

**Empirical models** --see Crime scene reconstruction, and Computer generated

**Established areas, how to challenge.** Areas or knowledge that are accepted as reliable without the need for a *Daubert* hearing must be challenged with some evidence of unreliability. Simply asking for a *Daubert* hearing is not enough. The opponent must make a proffer of some evidence of unreliability before a *Daubert* hearing will be required. *Florence v. Com.*, 120 S.W.3d 699, 703 (Ky. 2003).

**Experience-based expertise.** Allowing a detective's "modest, experience-based opinion" is not error despite his lack of expertise in eye-witness identifications. *Duncan v. Com.*, 322 S.W.3d 81, 96 (Ky. 2010) (based on interviewing witnesses for twenty-one years detective opined it was common for a witness to be mistaken about a suspect's height). "[W]here the knowledge required is neither extensive nor complex, an officer's opinion may be admissible on the basis of training and experience. *Duncan*, 322 S.W.3d at 97; *Dixon v. Com.*, 149 S.W.3d 426 (Ky.2004) (narcotics investigator allowed to opine that notations on slip of paper referred to drug transactions).

*Daubert* applies to all opinion and all expertise related to a scientific or technical, specialized area. *Kumho Tire*, 526 U.S. at 141. In every case, the trial court "should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Kumho Tire*, 526 U.S. at 152. Counsel might consider getting an expert to testify on basic scientific method to show the field in question can be evaluated by one or more of the five *Daubert* factors. If it can, then under *Kumho Tire*, it should be so evaluated.

**Expertise, how much is required.** See Qualified as expert.

**Eyewitness identification.** Expert testimony on eyewitness identification is admissible. *Com. v. Christie*, 98 S.W.3d 485 (Ky.2002). However, a Justice Department report that in 80 percent of cases involving mistaken conviction, it was eyewitness identification that convicted the defendant was not admissible when it was found not relevant to a pending case. *Houston v. Com.*, 2011 WL 3962511 (Ky. App. 2011) (Unreported). The expert in *Houston* was allowed to testify only regarding the various factors that affect memory and eyewitness identification and how they related to the facts in Houston's case. See Form of opinion.

**False Confession.** In *Rogers v. Com.*, 86 S.W.3d 29 (Ky.2002), the trial court erred by excluding physician testimony that Rogers' limited mental capacity could have caused him to confess falsely. See Form of opinion.

**Federalize.** To preserve KRE 702 evidence issues for federal review, cite *Rock v. Arkansas*, 483 U.S. 44, 56 (1987) (right to present defense was violated by ban on hypnotically refreshed testimony); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (right to present a defense was denied by exclusion of evidence); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (excluding hearsay violated due process); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (exclusion of reliable evidence bearing on guilt violates due process) and *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (allowing unreliable bite-mark evidence violated *Chambers* and due process). Unreliable evidence also lessens the Commonwealth's burden of proof by allowing the jury to base guilt on that, rather than on the elements, in violation of the 14th Amendment, and Kentucky Constitution §§ 2 and 11. The 6<sup>th</sup> Amendment right to confront includes the right to confront and cross-examine opposing witnesses. *Olden v. Kentucky*, 488 U.S. 227 (1988). Denial of cross-exam also violates due process. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *DeGailey v. Com.*, 508 S.W.2d 574 (Ky.1974). Put the desired cross-exam and material in the record by avowal. *Noel v. Com.*, 76 S.W.3d 923 (Ky.2002); KRE 103(a)(2).

## NOTES

**Fiber analysis.** Trial courts may take judicial notice that fiber analysis is a reliable science. *Johnson v. Com.*, 12 S.W.3d 258, 262 (Ky.1999). But unless microspectrophotometry has been conducted, fiber analysis is arguably comparable to preliminary breath testing, and should only be admissible to support probable cause. See *Com. v. Bussell*, 226 S.W.3d 96, 105 (Ky.2007) (counsel was ineffective in failing to contradict the Commonwealth's scientific evidence). See Preliminary tests, below.

**Fingerprint analysis, "Lifescan"** The reliability of fingerprint identification and comparison conducted with ink cards has long been established. *Johnson v. Com.*, 12 S.W.3d 258, 262 (Ky.1999); *Shelton v. Com.*, 134 S.W.2d 653, 657 (Ky.1939). Kentucky's first challenge to the reliability of the "Lifescan" fingerprint method --whereby the subject's fingers are moistened and rolled over a computer scanner-- failed when there was also a positive ink fingerprint comparison. *Smith v. Com.*, 2004 WL 2364596, (Ky.2004) (Unreported).

Note: Fingerprint cards created by "Lifescan" computer software are computer generated visual evidence (CGVE). *State v. Foreman*, 954 A.2d 135, 159 (Conn.2008). "Lifescan" prints are simulations, scale models. See Computer generated visual evidence.

**Form of opinion.** An expert doesn't have to have an opinion in order to testify. Rule 702 allows an expert to testify if it will "assist the trier of fact to understand the evidence" ... and may testify thereto in the form of an opinion "or otherwise." Under KRE 702 an expert doesn't have to have reached a conclusion regarding the immediate case in order for her testimony to be admissible. The role of the expert can be simply to explain the science or technical area to the fact-finder so that the fact-finder can make a better-informed decision. *Terry v. Com.*, 332 S.W.3d 56, 61 (Ky. 2010) (expert would have merely provided the jury with expert testimony, aiding them in assessing defendant's confession). See also *Houston v. Com.*, 2011 WL 3962511 (Ky. App. 2011) (Unreported). The expert in *Houston* was allowed to testify only regarding the various factors that affect memory and eyewitness identification and how they related to the facts in Houston's case.

**Gatekeeper.** The trial court's "gatekeeper" responsibilities are summarized in *Burton v. CSX Transp., Inc.*, 269 S.W.3d 1 (Ky. 2008) as follows:

The trial court must determine whether the expert's proffered testimony of "scientific, technical or other specialized knowledge" will "assist the trier of fact to understand or determine a fact in issue." To admit the expert testimony, the trial court must determine that the testimony is both reliable and relevant to the case before it. In determining whether the testimony is reliable under *Daubert*, the trial court must assess whether the "reasoning or methodology" underlying the testimony is scientifically valid. A non-exclusive list of specific factors to consider in determining reliability has arisen in decisional law:

1. whether the theory or technique can be and has been tested;
2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and
4. whether the theory or technique has been generally accepted in the particular field.

*Burton v. CSX Transp., Inc.*, 269 S.W.3d at 6 (footnotes omitted).

A court may not abdicate this duty. The court must conduct *some adequate inquiry*, and establish on the record the basis for admission or exclusion. *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky.2004).

If qualified experts disagree, the solution is to let the experts fight it out at trial and let the jury decide whose opinion is reliable. "The gate-keeping function of the court was never meant to supplant the adversarial trial process." *Com v. Martin*, 290 S.W.3d 59, (Ky.App. 2008) (reversing trial court decision to bar shaken baby syndrome opinion) *Id.*

**Guilt phase versus penalty phase.** In *Weaver v. Com.*, 298 S.W.3d 851, 854-55 (Ky. 2009) prejudice from refusing to allow the expert during the guilt phase and instead allowing him only during the penalty phase was obvious when the jury recommended a minimum sentence. See Intoxication defense.

**Handwriting analysis.** In *Florence v. Com.*, 120 S.W.3d 699, 701 (Ky.2004) the Court afforded handwriting analysis "judicial notice" status based on two appellate decisions from the 1950's upholding trial court decisions allowing handwriting opinion. See Established areas. Even lay opinion on handwriting, at least to some extent, is admissible. *Roach v. Com.*, 313 S.W.3d 101, 108-09 (Ky. 2010) (allowing detective who was "by no means a handwriting expert" to point out significant differences between signatures known

## NOTES

to be authentic and those that were suspicious, without giving his opinion). If an expert is used, KRE 702 requires proof that the expert has applied the “principles and methods” of the field “reliably to the facts of the case.” Counsel should press handwriting experts to articulate principles and methods. Like ballistics, handwriting analysis is more an art than a science. Argue handwriting match opinion is the pure “*ipse dixit*” of the expert. Federalize by citing *General Electric v. Joiner, supra*. See Federalize and Performance of expert in this case.

**Hair analysis, microscopic.** Kentucky has judicially noticed hair analysis by microscopic comparison as “reliable.” *Johnson v. Com.*, 12 S.W.3d 258, 262 (Ky.1999). Counsel should argue hair analysis is “preliminary testing,” reliable enough for probable cause, or a suppression hearing, or for determining which hairs merit “real” DNA testing, but not a reliable enough basis for an identification, or finding of guilt. See *Murphy v. Com.*, 2008 WL 1850626, 3 (Ky.2008) (Unreported) (upholding introduction of microscopic hair analysis despite inconclusive DNA results). Use a defense expert. In *Bussell*, a defense expert found that three of the Commonwealth’s expert’s hair comparisons were invalid and found the prosecution expert’s approach “quite disturbing” because there was no indication in her notes that a comparison microscope had been used. *Com. v. Bussell*, 226 S.W.3d 96, 104 -105 (Ky.2007) (upholding grant of new trial). See Preliminary tests.

**Hearing,** See *Daubert* hearing.

**Homicide by heart attack.** A medical examiner (forensic pathologist) may express an opinion as to the “manner of death,” in this case “homicide by heart attack,” i.e., opine that the manner of a disputed death was homicide as opposed to natural causes or suicide. *Baraka v. Com.*, 194 S.W.3d 313 (Ky.2006).

**Hypnosis.** Admission of post-hypnotic identification and testimony was not clearly erroneous. “Totality of circumstances” is the standard for hypnotically induced, refreshed, or enhanced recollection. *Id.* A witness cannot be impeached with a transcript of statements she made under hypnosis. *Roark v. Com.*, 2004 WL 314731 (Ky.2004) (Unreported).

**Ineffective assistance of counsel claims** related to KRE 702 are evaluated under the law at the time of the challenged attorney action. Defense counsel was not ineffective for failing to obtain a ruling on admissibility and funding of eyewitness identification expert testimony at a time when the law did not support obtaining such an expert. *Shegog v. Com.*, 275 S.W.3d 728 (Ky. App. 2008).

**Intoxication defense.** *Weaver v. Com.*, 298 S.W.3d 851, 854-55 (Ky. 2009) (reversing because the trial court prevented presentation of an expert during the guilt phase supporting an intoxication defense and only allowed it during the penalty phase.) See Guilt phase versus penalty phase.

**Judicial notice.** A court, including an appellate court, may take judicial notice to support a determination on reliability. *Fugate v. Com.*, 993 S.W.2d 931 (Ky.1999).

***Ipse dixit.*** See Performance of expert in this case.

**Law experts not allowed.** A witness may not express an opinion as to the law. Legal questions are reserved exclusively for the judge under RCr 9.58. *Rockwell International Corp. v. Wilhite*, 143 S.W.3d 604, 623 (Ky.App.2003).

**License not required.** *Fehr v. Fehr*, 284 S.W.3d 149, 154 (Ky. App. 2008) ) (real estate license not required to opine on value of real estate). Unlicensed investigator may testify in arson prosecution as expert witness on cause and origin of fire based on knowledge, skill, experience, training, and education. *Lukjan v. Com.*, 358 S.W.3d 33 (Ky. App. 2012). See Qualified as expert.

**Literature review as basis of opinion.** A qualified expert’s opinion may be based on a review of relevant scientific literature. Such testimony must be relevant and reliable under *Daubert*. *Burton v. CSX Transp., Inc.*, 269 S.W.3d 1, 7 (Ky. 2008). A “literature review” must be conducted properly. *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 475 (M.D.N.C. 2006) (cited in *Burton*, 269 S.W.3d at fn. 16) (literature review that was not conducted properly did not meet the *Daubert* standard of being both derived by the scientific method and relevant to the “task at hand.”).

**Ligature/ strangulation.** A witness with extensive army training and experience in garroting was deemed qualified to render an opinion on how a person was strangled. *Bratcher v. Com.*, 151 S.W.3d 332, 352 (Ky.2004).

**Luminol** – See Blood tests , Preliminary tests.

**Medical causation** – See Causation.

## NOTES

**Nurses, standard of care.** A doctor was sufficiently qualified to testify regarding standard of care expected of nurses in emergency treatment of seizure patient. *Tapp v. Owensboro Medical Health System, Inc.*, 282 S.W.3d 336 (Ky. App. 2009).

**Opening door.** In *Com. v. Alexander*, 5 S.W.3d 104, 105 (Ky. 1999), the court agreed with the Commonwealth that the defense did, in fact, “open the door” by asking the police sergeant his opinion about who was at fault for the collision.

**Opinion.** See Form of Opinion.

**Paternity presumption.** Introduction of paternity test results based on a 50% presumption that sexual intercourse occurred, resulting in a 99.74% likelihood that the defendant was the father of his minor stepdaughter's child, did not violate the presumption of innocence, lessen the prosecutor's burden or violate due process. *Butcher v. Com.*, 96 S.W.3d 3 (Ky.2002) (argument was unpreserved). The issue is worth raising again.

**Pedophile profile.** In *Tungate v. Com.*, 901 S.W.2d 41, 42-44 (Ky.1995), the court upheld exclusion of a psychiatrist's “profile” or list of “indicators” of pedophilia, saying that “it will require much more by way of scientific accreditation and proof of probity” to justify admission.

**Performance of expert in this case.** If a proposed expert has not reliably applied the principles and methods of the field, a court may preclude opinion testimony. *Ragland v. Com.*, 191 S.W.3d 569, 580 (Ky.2006) (expert conclusions re: lead bullet analysis from CBLA results). There must be “a link between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support.” *United States v. Mamah*, 332 F.3d 475, 478 (7th Cir.2003). “Nothing in either *Daubert* or the Federal Rules of Evidence requires a ... court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *General Electric v. Joiner*, 522 U.S. 136, 146 (1997).

**Polygraph.** Evidence obtained as a result of a polygraph examination is still inadmissible in Kentucky. *Garland v. Com.*, 127 S.W.3d 529 (Ky. 2003), *overruled on other grounds by Lanham v. Com.*, 171 S.W.3d 14 (Ky. 2005). Under *Martin* (see Shaken Baby Syndrome, below) counsel may now argue polygraph evidence should be allowed based on the current dispute over reliability of polygraphs.

**Portable Breath Test, Preliminary Breath Test.** Mentioning a preliminary breath test (PBT) at trial is allowed, but specific results of a PBT or any breathalyzer not specified in KRS 189A.104 as proven reliable is inadmissible. *Williams v. Com.*, 2003 WL 1403336 (Ky.App. 2003). The statute does not bar a defendant who seeks to admit PBT results as part of a defense in a non-DUI prosecution. *Elery v. Com.*, 368 S.W.3d 78, 95 (Ky. 2012) (allowing PBT evidence for the purposes of mitigating the impact of defendant's statements to the police). The Court in *Elery* noted that if challenged, a PBT result may be required to satisfy KRE 702). *Id.* at fn, 9.

**Preliminary tests.** Preliminary, presumptive test results arguably should be excluded because they are by definition unreliable, lack probative value, and are often highly prejudicial. *Thacker v. Com.*, 2003 WL 22227194 (Ky. 2003) (Unreported) (upholding exclusion of presumptive toxicology test results). Other courts have also concluded that presumptive tests are too unreliable to be relevant. *State v. Kelly*, 770 A.2d 908 (Conn. 2001) (presumptive blood test results not allowed); *United States v. Hill*, 41 M.J. 596 (Army Ct.Crim.App. 1994) (evidence of luminal preliminary blood test results not allowed). But beware: preliminary, and other questionable test results tend to be admissible in Kentucky despite defects in reliability. *Yell v. Com.*, 242 S.W.3d 331 (Ky.2007) (upholding introduction of arson dog alerts when lab testing contradicted them); see also, *Smith v. Com.*, 2010 WL 1005907 (Ky. 2010) (Unreported) (approving introduction of test results showing a child tested positive for chlamydia despite lack of FDA approval or testing of the test on the child's age group). See also *Murphy v. Com.*, 2008 WL 1850626, 3 (Ky.2008) (Unreported) (upholding introduction of presumptive blood tests on grounds that deficiencies in “this type of evidence” go to weight, not admissibility).

**Preservation.** Counsel must say more than just “the witness is giving an opinion” and must expressly request a *Daubert* hearing. A trial court has no duty to conduct a *Daubert* hearing *sua sponte*. *Clay v. Com.*, 291 S.W.3d 210, 217 (Ky. 2008); see also, *Mondie v. Com.*, 158 S.W.3d 203, 212 (Ky.2005) (error unpreserved where defense counsel objected to witness's testimony as that of a lay witness, but did not object to failure to qualify witness as an expert and did not request a *Daubert* hearing); *Love v. Com.*, 55 S.W.3d 816, 822 (Ky.2001) (issue of failure to conduct *Daubert* hearing unpreserved where defendant's objection was premised on relevancy under KRE 401 and not on scientific reliability under KRE 702). The Commonwealth must also preserve objections to expert qualifications or methodology, or be precluded from raising the issue on appeal. *Com., Transp. Cabinet, Dept. of Highways v. Watts*, 2011 WL 5439407



## NOTES

(Ky. App. 2011) (Unreported). KRE 702 requires placing the material on which the expert relied in the record for appeal. *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky.2004).

**Probability versus possibility.** When doctor testified the plaintiff *might possibly require* neck and/or shoulder surgery his testimony was properly excluded by the trial court as being speculative. *Combs v. Stortz*, 276 S.W.3d 282, 296 (Ky. App. 2009) (to be admissible doctor's opinion had to be expressed as more than just a possibility).

**Psychological profile.** Police may not testify to a psychological profile of the killer and then say the defendant fit the profile. *Day v. Com.*, 2011 WL 5878361 (Ky. 2011) (Unreported). In dicta the court suggested it might admit a profile developed from a particular crime scene, rather than a profile of a general category of offenders, if a proper foundation of expertise was laid. *Id.*

**Qualified as expert.** There is no precise rule as to the mode in which expertise must be acquired. *Mondie v. Com.*, 158 S.W.3d 203, 212 (Ky.2005). "Adequate" rather than "outstanding" qualifications are required. An ER nurse who never worked in a nursing home was qualified to opine regarding nursing home care standards based on some training in wound care, practical experience in recognizing and treating pressure ulcers, and familiarity with nursing procedures. *Thomas v. Greenview Hospital*, 127 S.W.3d 663 (Ky.App.2004), *overruled on other grounds in, Lanham v. Com.*, 171 S.W.3d 14, 20 (Ky.2005). The fact an expert's area of expertise and practical experience may lie in another area doesn't bar his testimony. *Boon Edam, Inc. v. Saunders*, 324 S.W.3d 422, 428 (Ky. App. 2010); but *cf., Raifsnider v. Com.*, 2010 WL 1641111 (Ky. 2010) (Unreported) (refusing to allow expert in toxicology and pharmacology, and not a psychologist, to testify that defendant was motivated by drugs); *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675, 677-78 (Ky.App.2000) (fact that witness is not a specialist goes to weight). Less educated experts can qualify through training and/or experience alone, e.g., law enforcement officers. *Dixon v. Com.*, 149 S.W.3d 426 (Ky.2004) (opinion on the meaning of entries in a drug dealer's papers); *Fulcher v. Com.*, 149 S.W.3d 367 (Ky.2004) (something smelled like ammonia).

*But compare. At least one case has required an expert to have stronger qualifications. In West v. KKI, LLC*, 300 S.W.3d 184 (Ky. App. 2008) an amusement park safety expert's testimony was inadmissible despite fact he observed and rode "CHANG," reviewed operating and maintenance manuals, took photographs, and concluded the ride could result in injuries. He lacked expertise in biomechanics. Dr. George Nichols' testimony was similarly excluded. Nichols' expertise in biomechanics was not "broad" enough. *West v. KKI, LLC*, 300 S.W.3d 184, 197 (Ky. App. 2008).

**Report of expert.** See Discovery.

**Scientific, technical, or otherwise specialized.** "Scientific" implies "a grounding in the methods and procedures of science." *Daubert*, 509 U.S. at 589-590. "Technical" or "other specialized" knowledge refers to all other topics proposed as the basis of expert opinion evidence. This is plainly stated in the second paragraph of *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

Kentucky considers certain areas of knowledge "established" as reliable under Rule 702. In *Fugate v. Com.*, 993 S.W.2d 931 (Ky.1999), the Kentucky Supreme Court took judicial notice that the RFLP and PCR methods of DNA testing have achieved scientific reliability, and thus a *Daubert* hearing is no longer required prior to admitting such evidence. In *Johnson v. Com.*, 12 S.W.3d 258, 262 (Ky.1999), the Court took judicial notice that microscopic hair analysis, and numerous other areas have "achieved the status of scientific reliability." See also Experience-based expertise.

**Sex offender, risk assessment.** Trial judge correctly accepted the results of the risk assessment evaluation without qualifying the tests pursuant to *Daubert*. *Hyatt v. Com.*, 72 S.W.3d 566, 575 (Ky.2002). Evidence rules do not apply in pre-trial proceedings.

**Shaken Baby Syndrome (SBS).** SBS evidence is not admissible without holding a *Daubert* hearing to determine its reliability. *Hamilton v. Com.*, 293 S.W.3d 413 (Ky. App. 2009) (error in admitting SBS evidence was not harmless). But as long as qualified experts disagree, they must fight it out in front of the jury. *Com v. Martin*, 290 S.W.3d 59 (Ky.App.2008) (overturning trial court decision to bar SBS opinion in the absence of evidence of hard impact). Note: the theory that Shaking Alone can cause subdural hematomas and retinal hemorrhages has been discredited. Evidence of Shaking with Hard Impact is now believed to be required. A third sub-theory, Shaking with Soft Impact (with a changing table, or bed) has not been established as reliable. This is still a developing field of knowledge.

## NOTES

Note: As a matter of equal protection, counsel should seek funding for an expert with the same experience and stature as the Commonwealth's expert to address the national, and international research status of SBS, or any similarly questionable forensic "science."

**Simulations, scale models.** See Computer-generated.

**Sniffer dogs.** See Dogs.

**Specialist,** see Qualified.

**Specific expertise.** Being an expert is not enough. One must be an expert as to the specific question asked. *Kemper v. Gordon*, 272 S.W.3d 146, 154 (Ky. 2008), citing *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.1994).

**Stringer formula.** The most-frequently cited case summary on how to admit expert opinion testimony:

Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

*Stringer v. Com.*, 956 S.W.2d 883, 891 (Ky.1997).

**Supporting evidence.** Animal studies, medical literature reviews, general chemical properties of drugs, ADRs reported to the FDA, the "general acceptance" by relevant associations, medical texts, individual experiments, and scientific observations are all appropriate material for experts to consider and rely on, and all can be used for cross-exam. KRE 803(18) learned treatise material may be used for cross-exam, and may be read to the jury. Under Rule 803 these materials may not be introduced and placed in the jury's hands, unless they qualify under KRE 703(b), which allows an expert's supporting materials to go to the jury if they are "determined to be trustworthy, necessary to illuminate testimony, and unprivileged." See, *Hyman & Armstrong, P.S.C. v. Gunderson* 279 S.W.3d 93 (Ky. 2008) (supporting materials going to the jury must individually qualify under *Daubert*).

**Toxicology,** see Preliminary tests.

**Tree, wood analysis.** In *Bussell*, a defense expert conducted tests using a method of analysis generally accepted in the scientific community since 1970, and concluded that the bark could have come from any one of seven species of tree. *Com. v. Bussell*, 226 S.W.3d 96, 105 (Ky.2007)

**Ultimate Issue opinion allowed.** Under *Stringer v. Com.*, 956 S.W.2d 883 (Ky.1997) an expert witness may testify on matters relating to the "ultimate issue."

**Urinalysis results.** If impairment is established through other evidence, the use of the urinalysis is permissible to identify the impairing substance. *Burton v. Com.*, 300 S.W.3d 126, 136 (Ky. 2009) (relevance of positive urinalysis results for marijuana and cocaine substantially outweighed by danger of undue prejudice). Urinalysis results may reveal drugs that are evidence of mental state, but if the results are "temporally disconnected" from the criminal event they are proof only of other "crimes, wrongs or acts" pursuant to KRE 404. The evidence must be first evaluated under KRE 404, and if found admissible, then under KRE 403. If the results are close in time, it is a KRE 402 and KRE 403 matter. *Burton*, 300 S.W.3d at 133.

**Voiceprint analysis.** The FBI has determined that voiceprint analysis is not reliable. *U. S. v. Angleton*, 269 F. Supp. 2d 892 (S. D. Tex., 2003). Under *Ragland v. Com.*, 191 S.W.3d 569, 580 (Ky.,2006) (throwing out lead bullet analysis following the lead of the FBI ) since the FBI considers voiceprints unreliable, under *Ragland*, a finding to the contrary by a Kentucky court would be "clearly erroneous."

**Wantonness.** Relevance of defendant's positive urinalysis results for marijuana and cocaine introduced to show wantonness was substantially outweighed by danger of undue prejudice. *Burton v. Com.*, 300 S.W.3d 126 (Ky. 2009).

### **KRE 703: Bases of opinion testimony by experts**

- a. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

## NOTES

- b. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
- c. Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 51

**DISCUSSION:**

Under KRE 703(b) an expert's supporting materials are not allowed in evidence unless the materials are established as reliable under *Daubert* and *Kumho Tire*. The Commentary says "trial judges should take an active role in policing the content of the expert witness' direct testimony." An expert may rely on information that ordinarily could not be mentioned in front of the jury, KRE 703(a), and may let the jury know the basis of his conclusions, even if it would ordinarily be inadmissible. KRE 703(b).

- a. **Admonishment.** If supporting evidence is trustworthy, necessary to illuminate the testimony, and unprivileged, it may be introduced. On request the judge can admonish the jury to limit use of this evidence to "evaluating the validity and probative value of the experts' opinion or inference."
- b. **At or before the hearing.** See In-court information as basis (m).
- c. **Balancing under KRE 403.** The judge must also subject supporting materials to KRE 403 balancing.
- d. **Company records, information from employees.** *Meece v. Com.*, 348 S.W.3d 627, 684 (Ky. 2011), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 105 (2012) (approving introduction of expert opinion based upon a review of company records and information received from other employees of Sentry Safe despite fact these were hearsay).
- e. **Cross-exam is unlimited.** Under KRE 703(c), cross-exam is not to be limited. If an adverse party is willing to go into otherwise inadmissible matters to attack an opposing expert's opinion, this is allowed.
- f. **Discovery, reciprocal.** Contact expert witnesses before trial to obtain supporting materials. You may not be allowed to introduce articles, etc. that have not been provided to opposing counsel in discovery. Look at KRE 803(18) and KRE 703(b). Prepare to argue that the supporting material individually meets *Daubert*.
- g. **Determined to be trustworthy.** Under KRE 703(b) supporting materials must be trustworthy in and of themselves before they can be introduced to the jury. *Smith v. Com.*, 2010 WL 1005907 (Ky. 2010) (Unreported) (Note Justice Noble's dissent citing, *Reference Manual for Scientific Evidence* (2d ed.2000), published by the Federal Judicial Center in Washington, D.C.).
- h. **Disputed information as basis.** See Made known (o).
- i. **Excluding portion of supporting materials.** The Commentary notes that "under proper circumstances, a portion of the basis of an expert's opinion might be excluded even though independently admissible as evidence." Obviously, the drafters intend for very limited introduction of otherwise inadmissible evidence under Subsection (b).
- j. **Findings required.** Supporting materials were correctly excluded when the trial court did not make the required findings that the statements were "trustworthy" or "necessary to illuminate testimony." *Hoff v. Com.*, 394 S.W.3d 368, 374 (Ky. 2011), citing, *Rabovsky v. Com.*, 973 S.W.2d 6, 11 (Ky.1998).
- k. **Hypotheticals** are allowed as a basis for expert opinion.
- l. **Hearsay, other inadmissible evidence** KRE 703(b) allows evidence not otherwise admissible to come in "[i]f determined to be trustworthy, necessary to illuminate testimony, and unprivileged," to explain the basis of an expert's opinion. *Hoff v. Com.*, 394 S.W.3d 368, 374 (Ky. 2011). Under KRE 703(b), otherwise inadmissible supporting materials may be introduced "at the discretion of the court," for the limited purpose of illustrating the opinion, or explaining why the witness reached the opinion.

## NOTES

- m. **In-court information as basis of opinion.** Under KRE 615(3), an “essential” expert witness may remain in the courtroom to hear facts or data introduced into evidence. KRE 703(a) allows an expert to base an opinion on information obtained “at or before the hearing.” *Baraka v. Com.*, 194 S.W.3d 313, 314–315 (Ky.2006). If a party fails to present evidence meeting KRE 615(3), a court will not abuse its discretion under 703(a) by refusing to compel an expert’s attendance at trial). *Stinnett v. Com.*, 364 S.W.3d 70, 84-85 (Ky. 2011) (based upon the facts as presented, court acted correctly).
- n. **List of facts** In addition, the witness can be given a list of facts either before or during trial and, on those facts, give a hypothetical opinion.
- o. **“Made known” to the expert** Under KRE 703(a), an expert may base an opinion on facts or data either perceived by the witness or “made known.” *Baraka v. Com.*, 194 S.W.3d 313, 314 (Ky. 2006) (medical examiner based opinion that death was “death by heart attack,” in part on disputed information provided by police).
- p. **Necessary to illuminate** See *Hoff v. Com.*, 394 S.W.3d 368, 376 (Ky. 2011) (victim statements to doctor naming her father were not “necessary to illuminate testimony” and doctor statement, “I have no reason not to believe this child,” created an inference that he *did* believe her, bolstering her testimony).
- q. **Perceived facts, personal knowledge** An expert may testify like any fact-witness based on personal perceptions, as in the case of a chemist testifying about a chemical analysis that she personally conducted.
- r. **Privileged** information is not admissible under KRE 703, despite the fact it may have been used to support an expert’s opinion.
- s. **Reasonably relied on in the field.** Under KRE 704(a) otherwise inadmissible supporting information cannot be introduced unless it is “of a type reasonably relied upon in the particular field in forming opinions or inferences...” This is a KRE 104(a) determination. In *Parrish v. Kentucky Board of Medical Licensure*, 145 S.W.3d 401, 410 (Ky.App. 2004), an expert witness was entitled to rely on American College of Radiology standards because they were of the type reasonably relied on by experts in the field of radiology....”

**Rule 704 (Number not utilized): “Ultimate Issue”****Discussion:**

As originally proposed in 1989, Kentucky’s rule paralleled the language of FRE 704, which approves “ultimate issue” testimony (except re: a defendant’s mental state). The rule was not adopted, and for several years, Kentucky’s common law continued to preclude opinion testimony on an “ultimate issue.” In *Stringer v. Com.*, 956 S.W.2d 883, 890-891 (Ky.1997), the Kentucky Supreme Court set out the rules for admitting expert opinion evidence, including “ultimate issue” evidence. Such opinion is admissible if:

1. the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies *Daubert*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness versus prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

*Stringer v. Com.*, 956 S.W.2d 883, 890-891 (Ky.1997).

Caveat: The ultimate issue in a criminal case is guilty or not guilty. *Com. v. Alexander*, 5 S.W.3d 104 (Ky.1999). However, opinions or testimony as to guilt or innocence are still excluded because they are not helpful. KRE 702. The line between ultimate issue opinion and opinion that a client is guilty is a fine line.

**KRE 705: Disclosure of facts or data underlying expert opinion**

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

**HISTORY:** 1992 c 324, § 18, 34, eff. 7-1-92; 1990 c 88, § 53.

**DISCUSSION:**

## NOTES

This rule permits flexibility in the presentation of an expert's testimony. Under this rule, the expert may give the opinion (or make the inference) before discussing the thought process that led to it or the factual basis for it. Since RCr 7.24(1)(b) and RCr 7.24(3)(A)(i) provide for pre-trial discovery of reports of scientific tests and experiments and of physical or mental examinations, an adverse party theoretically knows of the opinion in advance and can object to the inference or opinion before the witness testifies.

- a. **Access to underlying facts or data.** The right to independent testing is "implicit" in RCr 7.24. *Green v. Commonwealth*, 684 S.W.2d 13 (Ky.App.1984). Yet the Kentucky Supreme Court finds it "debatable" whether defendants have a right to receive, obtain and analyze facts or data underlying an expert's opinion, i.e., "raw data." *Clay v. Com.*, 291 S.W.3d 210, 219 (Ky. 2008), referencing *Green*. See Prior disclosure (f).
- b. **Avowal.** "Because counsel failed to take the necessary steps to preserve the original autoradiogram and computer printout by avowal," there was "no means to discern" whether the defendant was prejudiced by the trial court's erroneous exclusion of challenged DNA supporting data. *Hart v. Com.*, 116 S.W.3d 481, 484 (Ky. 2003).
- c. **Cross-exam.** "Expert testimony must be cross-examinable." *Sanborn v. Com.*, 892 S.W.2d 542, 550 (Ky.1994) (citing KRE 705). An adverse party may establish the underlying facts or data on cross-examination if they are not brought out by the proponent. *Hart v. Com.*, 116 S.W.3d 481 (Ky.2003) (autoradiograms and computer printout re: DNA).
- d. **Discovery, limine motion.** If inadequate underlying information is provided before trial, the adverse party should file a pretrial motion *in limine* seeking the expert's underlying supportive material. Justice Cooper's strong dissent in *Hart*, supports an argument that an expert's underlying facts and data should be provided pre-trial:  
  
...[the expert] was permitted to rely on her interpretations of the excluded evidence to support her opinions on direct examination and to rebut defense counsel's questions on cross-examination. Yet, no one else was permitted to even see the evidence. If an expert can use real evidence to support her conclusions but preclude the defendant and the jury from examining the same evidence to test the credibility of her testimony, we might as well throw away the key—and KRE 705 as well.  
  
*Hart v. Com.*, 116 S.W.3d 481, 486 (Ky. 2003) (J. Cooper, dissenting).
- e. **Privileged information.** Cross-exam of an expert witness who was hired to testify, and not strictly as an adviser, was not limited or protected by the attorney-client privilege, even after the defendant decided not to call the expert as a witness. *Sanborn v. Com.*, 892 S.W.2d 542, 550 (Ky. 1994).
- f. **Prior disclosure.** Under KRE 705 an expert is not automatically required to disclose underlying facts or data "unless the court requires otherwise." This language implies a right to request underlying facts and data in discovery or by a motion in limine. Access to the underlying facts and data would seem essential to effective cross-examination under this rule. See Discovery (d).
- g. **Underlying facts, data, defined.** What exactly constitutes "raw data"—whether it is the way a lab analyzes its results or the DNA sample itself—is subject to dispute, and it is not explicitly mentioned in KRE 705 or RCr 7.24. *Clay v. Com.*, 291 S.W.3d 210, 219 (Ky. 2008). Because KRE 705 permits cross-examination to disclose the "underlying facts or data" supporting an expert's opinion, a computer printout and autoradiogram relied on by a DNA expert were relevant and admissible. *Hart v. Com.*, 116 S.W.3d 481, 482-484 (Ky. 2003) (denying relief because defendant failed to ask for a continuance to obtain the original printout and radiogram to offer as an avowal). See Discovery.

### **KRE 706: Court-appointed experts**

- a. **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the

## NOTES

parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

- b. **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportions and at such time as the court directs, and thereafter charged in like manner as other costs.

**HISTORY:** 1992 c 324, § 18, 34, eff. 7-1-92; 1990 c 88, § 53

**DISCUSSION:**

It is best for criminal defendants to avoid this procedure. Even in post-conviction, once a hearing has been granted, Indigents may apply for funds for travel expenses of out-of-state witnesses or to hire an independent defense expert pursuant to KRS 31.185. *Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008). A court-appointed expert who testifies in a way that damages your client would be perceived as the judge's witness with no axe to grind. You could not impeach such an expert by questions about identification with the opposing party, retention on behalf of a class or type of plaintiff or defendant, or the amount and contingency of payment for services.

## Article VIII. Hearsay

## NOTES

KRE 802 excludes “hearsay” by declaring it inadmissible unless it falls under an exception established by a court rule. Rule 802 does not supersede other rules. Rather, hearsay issues require at minimum a three-step analysis.

1. The proponent first must show relevance, KRE 401-402, and overcome any objections of the opponent [typically Article IV or VI objections], before the hearsay question can be considered. If the evidence is irrelevant or the witness is incompetent, the hearsay nature of the evidence really does not matter.
2. But if the proponent makes the first required showing, then he must show that the proposed hearsay evidence falls under one of the recognized hearsay exceptions.
3. If the proponent makes the first two showings, the opponent of the evidence may still argue under KRE 403 that the evidence is more prejudicial than probative and should be excluded. This analysis applies to all hearsay issues.

### KRE 801: Definitions

- a. Statement. A “statement” is:
  1. An oral or written assertion; or
  2. Nonverbal conduct of a person, if it is intended by the person as an assertion.
- b. Declarant. A “declarant” is a person who makes a statement.
- c. Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted*.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 55

### **DISCUSSION:**

Article 8 is organized according to a plan in which hearsay is (1) identified and defined, (2) prohibited in most instances, and (3) permitted in certain well-delineated circumstances. KRE 801 defines hearsay.

- a. **“Assertions.”** 801 does not define this term. The Kentucky Supreme Court defined an “assertion” as “a statement or expression of a fact, condition, or opinion.” *Harris v. Commonwealth*, 384 S.W.3d 117, 126 (Ky. 2012)
- b. **801(a)(1) oral or written assertion.** An implied assertion offered to prove the truth of the matter asserted is hearsay and should be excluded absent an applicable exception. For example, questions which contain assertions can be hearsay. Whether a question contains an assertion, and thereby is a statement that could be subject to the hearsay rule, depends on the content of the question and the circumstances surrounding its utterance. Generally a party does not offer evidence unless it will advance the offeror’s case so trial courts should scrutinize the testimony to determine if it contains an assertion. *Harris v. Commonwealth*, 384 S.W.3d 117, 128 (Ky. 2012).
- c. **801(a)(2) Nonverbal conduct.** Nonverbal conduct ordinarily does not assert anything, but it can in some instances. A nod or gesture can be an answer to a question as much as an oral response. However, a witness’s observation of conduct and his conclusion of what it means is not hearsay. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) *overruled on other grounds* *Chestnut v. Commonwealth*, 250 S.W.3d 288; *Wheeler v. Commonwealth*, 121 S. W. 3d 173 (Ky.2003). To wit: a child’s nonverbal conduct in pointing at defendant following uncle’s asking child who touched her was the equivalent of a verbal assertion by child that defendant touched her, and thus the nonverbal assertion fell under the normal hearsay rules for the admission of evidence. *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010). The party claiming nonverbal conduct is an assertion has the burden of proof.
- d. **Hearsay is a statement not a monologue.** Hearsay deals first of all with a “statement.” It does not deal with several assertions lumped together and considered as a group because a person made them at one time out of court. In *Williamson v. U.S.*, 512 U. S. 594 (1994), the Court interpreted the same definitional language for the federal court system, and held that a hearsay “statement” means a “single declaration or remark” rather than a “report or narrative.” When considering a hearsay issue like a confession or a witness interview, the judge must consider each

## NOTES

individual statement, line by line and phrase by phrase. Each individual hearsay statement must qualify under a hearsay exception. *Osborne v. Commonwealth*, 43 S. W. 3d 234 (Ky.2001).

- e. A statement is **hearsay** if it is **(1) an out of court statement offered in evidence and (2) “to prove the truth of the matter asserted.”** Both conditions must be met before the statement is subject to the hearsay exclusionary rule. *Perdue v. Commonwealth*, 916 S.W.2d 148, 156 (Ky.1995). If an out of court statement is introduced simply to show that it was made or to show the effect it had on the person who heard it, (assuming that these matters are relevant in the first place), it is not considered hearsay. It is not being offered for the truth of the matter asserted. *Caudill v. Commonwealth*, 120 S. W. 3d 635 (Ky.2003). Don’t blindly accept opposing counsel’s hearsay objection. Consider whether the statement is being offered to prove the truth of the matter asserted. This response is a good way to avoid the hearsay issue altogether. On this issue, the Kentucky Supreme Court advises the following:

An objection on hearsay grounds will often be met with a claim that the statements in question are being offered as non-hearsay. The key to determining whether such a claim is legitimate, or merely a pretext for violating the hearsay rule, is a proper application of the relevancy requirement. ... Relevancy, in this respect, “does not turn on whether the information asserted tends to prove or disprove an issue in controversy, but on whether the action taken by the [witness] in response to the information that was furnished *is an issue in controversy.*” *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky.1988) *Meece v. Commonwealth*, 348 S.W.3d 627, 692 (Ky. 2011), reh’g denied (Oct. 27, 2011), *cert. denied*, 133 S. Ct. 105, 184 L. Ed. 2d 49 (U.S. 2012).

- f. 801(c): testimony that a witness previously made statements that were consistent with her trial testimony is hearsay. *Hoff v. Com.*, 394 S.W.3d 368, 379-380 (Ky. 2011).
- g. Testimony of police detective, that alleged victim “knew what happened and wasn’t a happy camper” when detective interviewed her at nursing home, was not “hearsay” in prosecution for in prosecution for adult exploitation and second-degree criminal possession of a forged instrument involving several large checks written from alleged victim’s checking account to defendant and defendant’s daughter; that testimony did not directly relate any statements by the now-deceased alleged victim. *Roach v. Commonwealth*, 313 S.W.3d 101 (Ky. 2010).
- h. Error in trial court’s admission of a detective’s testimony that a social security number given to a bank teller just before a robbery was defendant’s social security number, which was inadmissible hearsay, was not harmless with respect to a conviction for second-degree robbery; bank teller was the only witness to the robbery and could not make a positive identification of defendant, such that the social security number was the only linchpin evidence linking defendant to the robbery. *Wiley v. Commonwealth*, 348 S.W.3d 570 (Ky. 2010)
- i. **“Investigative hearsay.”** Statements on which an officer relied in taking a course of action, to wit: statements made by a witness “he ran that way” or other tip type information, are not hearsay because they are not offered to prove the truth of the matter asserted. These statements are admissible only if they are relevant. They are relevant only if they are used to explain why the officer acted as he or she did AND the officer’s actions are at issue. If the officer’s actions are not at issue, then the motivation for those actions is not relevant and the statements are not admissible. The actions of the officer on direct examination by the Commonwealth are rarely relevant. The Commonwealth must meet its burden of proof by showing the identity of the actor, commission of prohibited actions or omissions, and culpable mental state. Unless the officer’s actions bear directly on one of these points her actions are irrelevant and it does not matter what the officer was told. KRE 401; *Burchett v. Commonwealth*, 314 S.W.3d 756, 759 (Ky. App. 2010); *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky.1995); *Stringer v. Commonwealth*, 956 S.W.2d 883, 887 (Ky.1997). This exception/restriction applies to all witnesses, not just police officers. See, *Stringer v. Commonwealth*, 956 S.W.2d 883, 887 (Ky.1997); *Slaven v. Commonwealth*, 962 S.W.2d 845, 859 (Ky.1997).

### **KRE 801A: Prior statements of witnesses and admissions**

- a. **Prior statements of witnesses.** A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613 and the statement is:



## NOTES

1. Inconsistent with the declarant's testimony;
  2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
  3. One of identification of a person made after perceiving the person.
- b. **Admissions of parties.** A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:
1. The party's own statement, in either an individual or a representative capacity;
  2. A statement of which the party has manifested an adoption or belief in its truth;
  3. A statement by a person authorized by the party to make a statement concerning the subject;
  4. A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
  5. A statement by a conspirator of a party during the course and in furtherance of the conspiracy.
- c. **Admission by privity:**
1. Wrongful death. A statement by the deceased is not excluded by the hearsay rule when offered as evidence against the plaintiff in an action for wrongful death of the deceased.
  2. Predecessors in interest. Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would be admissible if offered against the declarant in an action involving that right, title, or interest.
  3. Predecessors in litigation. Even though the declarant is available as a witness, when the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is not excluded by the hearsay rule when offered against the party if the evidence would be admissible against the declarant in an action involving that liability, obligation, duty, or breach of duty.

**HISTORY:** 1992, c 324, § 20, 34, eff. 7-1-92; 1990 c 88, § 56

**DISCUSSION:**

The three subsections of this Rule deal with principles that are well established: statements of witnesses, admissions of parties, and admissions by privity. This discussion does not include Admissions by privity (subsection (c)) because they do not often figure in criminal cases. The Federal Rule flatly declares that these types of statements are not hearsay. Kentucky excepts them from the Hearsay Exclusionary Rule. Kentucky also differs markedly from the Federal Rule on the types of statements that can be qualified under KRE 801A(a)(1). This Rule provides that statements formerly admissible only as impeachment may also be admitted as substantive evidence.

- a. **Statement must be offered by a Party Opponent. Co-defendants are not party opponents.** Co-defendants in a criminal prosecution are treated as the same party for purposes of the rule. *Paulley v. Commonwealth*, 323 S.W.3d 715, 730 (Ky. 2010).
- b. **The failure to comply with KRE 613 renders the statement inadmissible.** Testimony by detective, that defendant's girlfriend had identified him from a bank surveillance photograph, was inadmissible hearsay as offered for impeachment purposes in robbery prosecution, where girlfriend had not first been asked about having made the identification during her testimony. *Tunstall v. Commonwealth*, 337 S.W.3d 576 (Ky. 2011).

**801 (a): Prior Statements**

- a. Subsection (a) allows any party to question a witness about prior statements as long as the witness (i) is the declarant of the statement, (ii) testifies at trial, (iii) is examined about the prior statement

## NOTES

pursuant to *KRE 613*, and (iv) the previous statement is (1) inconsistent with the witness/declarant's testimony, or (2) consistent with testimony and offered to rebut an allegation of recent fabrication or corrupt motive, or (3) one identifying a person after the witness/declarant has "perceived" the person.

- b. Prior statements need not be given "under oath" at legal proceedings or depositions. *Thurman v. Commonwealth*, 975 S.W.2d 888, 893-894 (Ky.1998).

### **801 (a)(1): Prior inconsistent statements.**

- a. Subsection (a)(1) continues long-standing Kentucky practice and is based on the belief that, as long as the declarant is present and subject to cross examination, "there is simply no justification for not permitting the jury to hear, as substantive evidence, all they [the declarant and the person testifying to the prior statement] have to say on the subject and to determine wherein lies the truth." *Porter v. Commonwealth*, 892 S.W.2d 594, 596 (Ky.1995). However, this applies only when the witness being impeached has "personal knowledge" of the issue inquired about. *Askew v. Commonwealth*, 768 S.W.2d 51 (Ky.1989); *Meredith v. Commonwealth*, 959 S.W.2d 87, 91 (Ky.1997).
- b. It is improper to introduce the prior inconsistent statement through the police officer prior to the witness being called and examined about the supposed statement: it is improper to "predict" that the witness will say something inconsistent. *White v. Commonwealth*, 5 S.W.3d 140, 141 (Ky.1999).
- c. Where the supposed maker of the statement denies making the statement or cannot remember making the statement, which contains admissions by a third party, it is permissible to then call a witness to relate that the witness did make the statement. *Hammond v. Commonwealth*, 366 S.W.3d 425, 434 (Ky. 2012); *Thurman v. Commonwealth*, 975 S.W.2d 888, 893 (Ky.1998); *Wise v. Commonwealth*, 600 S.W.2d 470, 472 (Ky.App.1978).
- d. The relevant inquiry in determining if a lack of memory is (or should be treated as) a prior inconsistent statement, is whether, within the context of the case, there is an appearance of hostility of the witness which is the driving force behind the witness's claim that he is unable to remember the statement. Is the witness's claimed lack of memory an attempt to frustrate the search for the truth? If so, it is an inconsistent statement. *Wiley v. Commonwealth*, 348 S.W.3d 570, 578-79 (Ky. 2010).
- e. If the declarant/witness admits the other statement was made, no further examination is necessary.
- f. Generally, a prior inconsistent statement of a witness may be used, not only to attack the credibility of the declarant, but also as **substantive** evidence with respect to the matter asserted. See *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky.1969), and *KRE 801A(a)(1)* which codifies the rule in *Jett*.

### **801 (a)(2): Prior consistent statements**

- a. Consistent statements may be used upon proper foundation but only for purposes of rebutting an express or implied charge against the declarant/witness of (1) recent fabrication or (2) improper influence or motive. Prosecutors in particular have often overlooked the limitation to rebuttal use and the limited issues for which the Rule provides exemption from the Hearsay Exclusionary Rule.
- b. Kentucky follows *Tome v. U.S.*, 513 U. S. 150 (1995), which limits consistent statements to those made before the motive for fabrication existed. *Slaven v. Commonwealth*, 962 S.W.2d 845, 858 (Ky.1997).
- c. Where a witness has been assailed on the ground that the story is a recent fabrication or that she has some motive for testifying falsely, it is permissible to show that she gave a similar account when the motive did not exist, before the effect of such an account could be foreseen, or when the motive or interest would have induced a different statement. *Smith v. Commonwealth*, 920 S.W.2d 514, 517 (Ky.1995) (quoting *Eubank v. Commonwealth*, 210 Ky. 150, 275 S.W. 630, 633 (Ky.1925)). While during her testimony the word "fabrication" was not expressed, it was implied. *Allen v. Commonwealth*, 278 S.W.3d 649, 655 (Ky. App. 2009)

## NOTES

- d. Testimony of police detective that victim made prior consistent statements in her interview with child advocacy center was admissible to rebut defendant's claim of fabrication or improper motive; defendant's defense throughout trial focused on victim's inconsistencies and inability to remember or recite specific details regarding alleged crimes, defendant introduced evidence that victim made statements during her testimony that were inconsistent with statements made during her interview, and detective testified that some of victim's statements in her testimony were consistent with those made in her interview. *Chames v. Commonwealth*, 2011-CA-000173-MR, 2012 WL 5373913 (Ky. App. Nov. 2, 2012) (not final).

**801(a)(3): Prior Identification**

- a. Subsection (a)(3) addresses the problem of a witness who once identified or failed to identify and who later, in trial testimony, either cannot identify the person or now identifies the person. This Rule deals primarily with a witness who has forgotten what the defendant looks like.
- b. The statement of identification can be oral or written, or it can be the act of picking the defendant's photograph out of a photopack. KRE 801(a). The witness describing the identification may also opine that the declarant showed no hesitation in making the identification. *Wheeler v. Commonwealth*, 121 S. W. 3d 173 (Ky. 2003).
- c. The Commentary makes it clear that this is an exemption from the Hearsay Exclusionary Rule only for the person who made the identification. (Commentary to 1989 Final Draft, Kentucky Rules of Evidence. p. 78).

**801(b): Party Admissions**

- a. Subsection (b) lists five instances in which a statement attributable in some way to a party may qualify as an exemption to the general Hearsay Exclusionary Rule. The common first requirement of all five is that the statement be offered against a party. What is often called "self-serving" hearsay, that is, a statement that is actually favorable to the party, cannot qualify. *Caudill v. Commonwealth*, 120 S. W. 3d 635 (Ky.2003). This requirement should not be confused with the statement against interest that is governed by KRE 804(b)(3).
- b. A party's own statement may be introduced against her whether the party appears to testify or not. In criminal cases, the defendant's "statement" to police is often introduced by the Commonwealth during its case in chief. It is important to remember the constitutional limitations on the use of the defendant's statements to the authorities. Involuntary statements may never be used. Statements taken without *Miranda* warnings cannot be used in chief but may be used to contradict the testimony of the defendant. *Canler v. Commonwealth*, 870 S.W.2d 219, 221 (Ky.1994).
- c. Comments by the defendant as to how to get rid of the other evidence of a crime consistent with his confessional statements as to what *he actually did* with the various items are admissible. *Meece v. Commonwealth*, 348 S.W.3d 627, 666 (Ky. 2011), reh'g denied (Oct. 27, 2011), *cert. denied*, 133 S. Ct. 105, 184 L. Ed. 2d 49 (U.S. 2012).
- d. Video recording of defendant's testimony from his first trial came within exception to rule against hearsay for party's own statement, in trial for capital murder. Although video recording of defendant's testimony from his first trial did not violate defendant's Fifth Amendment right against self-incrimination and was not inadmissible hearsay, in trial for capital murder, trial court should have determined whether probative value of recorded testimony was substantially outweighed by danger of unfair prejudice. *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010).
- e. Refusal to answer can be a non-verbal statement. Failure to respond to an accusation traditionally has been considered a manifestation of the accused person's belief that the accusation is true. In Kentucky, however, there is no legal duty to speak with police either before or after arrest or *Miranda* rights are given. KRS 519.040, 523.100 and 523.110 only prohibit false statements by a person who chooses to speak to police or other authorities. Thus, silence in the face of an accusation by police never should be construed as a non-verbal statement that might qualify under this rule. Nobody has to talk to the police.
- f. Silence in the face of an accusation by an ordinary citizen may or may not be a non-verbal statement although in a society influenced by the knowledge that "anything you say may be used against you" it is perhaps becoming unreasonable to expect anyone to respond to accusations.

## NOTES

*Perdue v. Commonwealth*, 916 S.W.2d 148, 158 (Ky.1995); *Blair v. Commonwealth*, 144 S.W. 3d 801, 806 (Ky.2004).

- g. The foundation for “admission by silence” requires proof that the party heard the statement, understood what the statement was, and remained silent. *Blair v. Commonwealth*, 144 S.W. 3d 801, 806 (Ky.2004); *Terry v. Commonwealth*, 153 S.W. 3d 794 (Ky.2005). Giving an answer unresponsive to the allegation can be an adoptive admission. *Dant v. Commonwealth*, 258 S.W.3d 12 (Ky.2008). However, a statement is not an adoptive admission if the party was somehow deprived of the freedom to act or speak against the accusation. *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky.2006).
- h. Obviously, a nod or an oral indication that a party believes that another’s statement is true can qualify another person’s statement as an exception under Subsection (b)(2).
- i. Subsection (b)(5) deals with statements made by other participants in a **conspiracy** that are introduced against the defendant who was part of the conspiracy. If such statements qualify, they may be used as substantive evidence against the defendant. The analysis for such statements is as follows:
  1. Obviously, the judge must first determine that a conspiracy existed and that the defendant was involved. KRE 104(a); *Gerlaugh v. Commonwealth*, 156 S.W. 3d 747, 753 (Ky.2005).
  2. The judge may consider the proffered statement as evidence that the conspiracy existed because the Rules of Evidence do not apply to KRE 104(a) determinations. KRE 1101(d)(1); *Gerlaugh*, p. 754.
  3. But Kentucky requires additional independent proof of an existing conspiracy before the finding can be made. *Gerlaugh*, p. 754.
  4. The judge must also find that the proffered statement was made while the conspiracy was going on and that it was “in furtherance” or served some purpose for the success of the conspiracy. Casual comments about the crime may not be in furtherance. *Monroe v. Commonwealth*, 244 S.W.3d 69 (Ky.2008).
  5. If the proponent meets the requirements and KRE 403 does not justify exclusion, co-conspirator statements may be introduced.

**KRE 802: Hearsay rule**

Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.

**HISTORY:** 1992, c 324, § 21, 34, eff. 7-1-92; 1990 c 88, § 57

**DISCUSSION:**

- a. RCr 3.14(2) permits hearsay in adult felony probable cause hearings. *White v. Commonwealth*, 132 S.W. 3d 877 (Ky.App.2003). The exceptions in KRE 801A, 803 and 804 also permit hearsay.
- b. **Analyzing Hearsay Issues:** the admissibility of each individual remark is determined by considering the following:
  1. Is the statement relevant? Does it have any tendency to make a fact of consequence to the determination of the action more probable or less probable...? KRE 401. If not, KRE 402 makes it inadmissible and there is no need to consider the hearsay issue.
  2. If relevant, is it hearsay as defined in KRE 801?
    - A. A statement
    - B. Other than one made while testifying at trial
    - C. Offered to prove the truth of the matter asserted.
  3. If not, the statement is not hearsay and KRE 802 does not exclude it.
  4. If so, KRE 802 excludes it from evidence unless the proponent qualifies it as an exception under KRE 801A, 803 or 804 and the exception does not violate the confrontation clause of the 6<sup>th</sup> Amendment as interpreted in *Crawford*.
  5. If the statement is not hearsay or the proponent qualifies it under a valid exception, the judge must balance probative value against prejudicial potential. KRE 403.

**KRE 803: Hearsay exceptions: availability of declarant immaterial****NOTES**

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

1. **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
2. **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
3. **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
4. **Statements for purposes of medical treatment or diagnosis.** Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.
5. **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.
6. **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
  - A. Foundation exemptions. A custodian or other qualified witness, as required above, is unnecessary when the evidence offered under this provision consists of medical charts or records of a hospital that has elected to proceed under the provisions of KRS 422.300 to 422.330, business records which satisfy the requirements of KRE 902(11), or some other record which is subject to a statutory exemption from normal foundation requirements.
  - B. Opinion. No evidence in the form of an opinion is admissible under this paragraph unless such opinion would be admissible under Article VII of these rules if the person whose opinion is recorded were to testify to the opinion directly.
7. **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or other data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
8. **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:
  - A. Investigative reports by police and other law enforcement personnel;

## NOTES

- B. Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and
  - C. Factual findings offered by the government in criminal cases.
9. **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements or law.
  10. **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with KRE 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
  11. **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationships by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
  12. **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices or a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
  13. **Family records.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
  14. **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
  15. **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
  16. **Statements in ancient documents.** Statements in a document in existence twenty (20) years or more the authenticity of which is established.
  17. **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
  18. **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
  19. **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.
  20. **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

## NOTES

21. **Reputation as to character.** Reputation of a person's character among associates or in the community.
22. **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment under the law defining the crime, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused.
23. **Judgment as to personal, family, or general history, or boundaries.** Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

**HISTORY:** 1994 c 279, § 5, eff. 7-15-94

**DISCUSSION:**

These exemptions from the hearsay exclusionary rule are premised on the belief that there is some circumstantial reason to believe that the statements are true or accurate at the time they are made and that cross examination is unlikely to show otherwise. Keep in mind that the opponent is authorized by KRE 806 to call any declarant as a witness if the opponent thinks that cross-examination of the declarant will be useful.

**803(1): Present Sense Impression**

Declarant must make the proffered statement contemporaneously with, or immediately after, an event or condition. *Bray v. Commonwealth*, 68 S.W.3d 375 (Ky.2002). The declarant's statement of pain upon being shot would be an obvious use of this exception as would the declarant's perception of the defendant as the shooter. A person's inquiry as to the source of blood, under the circumstances qualifies as an explanation of a condition made while the witness was perceiving the incident. *Caudill v. Commonwealth*, 120 S. W. 3d 635 (Ky.2004). The Commentary states that the underlying rationale for this exception is the lack of opportunity to fabricate. (Commentary to 1989 Final Draft, Kentucky Rules of Evidence. p. 83). If this is so, the time requirement for this exception is critical. Only a "slight lapse" of time is permitted. The proponent of the evidence must establish this by more than "generally" questioning witnesses as to the circumstances: the testimony as to time and circumstances must be rather detailed. *Jarvis v. Commonwealth*, 960 S.W.2d 466, 469-470 (Ky.1998); *Fields v. Commonwealth*, 12 S.W.3d 275, 279-280 (Ky.2000).

**803(2): Excited Utterance**

- a. This is similar to the present sense exception, except that it does not have the strict time limitation that the other exception has. In this situation, the statement must relate to a "startling" event or condition and must be made while the declarant is still "under the stress of excitement" caused by that event or condition. The requirements are what the rule says. The event must be of a startling nature, there must be evidence the declarant actually was placed under stress by the event, and the statement flowed therefrom. The key is the "duration of the state of excitement," although it is not the only consideration. Factors to consider in determining whether a statement is an excited utterance are (1) lapse of time between the main act and the declaration, (2) the opportunity or likelihood of fabrication, (3) the inducement to fabrication, (4) the actual excitement of the declarant, (5) the place of the declaration, (6) the presence there of visible results of the act or occurrence to which the utterance relates, (7) whether the utterance was made in response to a question, and (8) whether the declaration was against interest or self serving. *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011), reh'g denied (Oct. 27, 2011), cert. denied, 133 S. Ct. 105, 184 L. Ed. 2d 49 (U.S. 2012); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky.2007). See also *Jarvis v. Commonwealth*, 960 S.W.2d 466, 470 (Ky.1998). However, this is not a bright-line test for admissibility. *Soto v. Commonwealth*, 139 S. W. 3d 827, 860 (Ky.2004).
- b. An excited utterance cannot be introduced into evidence if it is determined to violate the Confrontation Clause because it is a testimonial statement. *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009)

**Examples:**

## NOTES

- c. Statements made by victim to a passersby that victim had been raped would be admissible at a trial for rape and sodomy under the exception to the hearsay rule for excited utterances; the statements were made immediately after the perpetrator was seen leaving victim's residence, the opportunity for fabrication was negligible, no inducement to fabrication was known, the actual excitement of victim was shown, there was no questioning before the statements were yelled, and the statements were not against her interest. *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009).
- d. Accomplice's statement that "Dennis was not supposed to be there!" was admissible as excited utterance in testimony of defendant's ex-wife, in murder prosecution arising out of shooting of accomplice's family, where statement was made approximately two hours after murders, ex-wife testified that accomplice was "freaking out" and defendant attempted to calm accomplice down after statement. *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011), reh'g denied (Oct. 27, 2011), cert. denied, 133 S. Ct. 105, 184 L. Ed. 2d 49 (U.S. 2012).

**803(3): Then Existing Mental, Emotional, or Physical Condition**

- a. This rule allows the declarant's statement of his "then existing state of mind," his emotion, sensation, or physical condition, to be related. The rule gives examples of legitimate purposes of such statements, to prove intent, plan, motive, design, mental feeling, pain or bodily health. *DeGrella v. Elsten*, 858 S.W.2d 698, 708-709 (Ky.1993). The statement must relate to things being presently observed or felt at the time the statement is made, not merely relating to a recollection of the event. *Blair v. Commonwealth*, 144 S. W. 3d 801 (Ky.2004); *Bratcher v. Commonwealth*, 151 S. W. 3d 332, 348 (Ky.2004).

**Examples:**

- b. Letters defendant and his children had written to each other were admissible under state of mind exception to hearsay rule, and thus trial court's exclusion of letters was error, in sentencing phase of capital murder prosecution; letters demonstrated emotional condition of love between defendant and children and were relevant to show bonds between family members. *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011), reh'g denied (Oct. 27, 2011), cert. denied, 133 S. Ct. 105, 184 L. Ed. 2d 49 (U.S. 2012).
- c. Internal states of mind (e.g., intention, love, malice, knowledge, fear, etc.) are regularly pertinent to issues in litigation. They are no less difficult to prove than pain or other bodily condition, not being observable to the naked eye, and thus, have long been the subject of an important exception to the hearsay rule: 'assuming that the state of mind of a person at a particular time is relevant, ... his declarations made at that time are admissible as proof on that issue, notwithstanding that they were not made in the presence of the adverse party.' " *Meece v. Commonwealth*, 348 S.W.3d 627, 695 (Ky. 2011), reh'g denied (Oct. 27, 2011), cert. denied, 133 S. Ct. 105, 184 L. Ed. 2d 49 (U.S. 2012).
- d. However, the defendant's family members' declarations regarding the defendant's state of mind would not be admissible because the state-of-mind exception to the hearsay rule is only applicable when the declarant makes a statement about his or her own state of mind. *St. Clair v. Commonwealth*, 319 S.W.3d 300, 318-19 (Ky. 2010).

**803(4): Statements for Purposes of Medical Diagnosis or Treatment**

- a. Admissibility of a statement under this rule is governed by a two-part test: (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010).
- b. This rule is often misapplied in child sexual abuse cases where the prosecutor introduces statements of the child made to a physician. The first challenge to this practice is under KRE 401-402. Unless the defense has claimed fabrication or delusion, the number of times the child told a consistent story before the trial is irrelevant. Unless statements to the physician are intended to rebut a charge of recent fabrication or improper motive to testify, they do not qualify as hearsay exceptions either. KRE 801A(a)(2).
- c. The statements made to a physician may properly be used to explain of the basis of the doctor's diagnosis or opinion regarding injury under KRE 703(b). However, statements admitted under



## NOTES

this rule cannot be used as evidence of the truthfulness of the statements and the judge must admonish the jury of this limitation upon request of the opponent.

- d. In *Fields v. Commonwealth*, 905 S.W.2d 510 (Ky.App.1995) and *Smith v. Commonwealth*, 920 S.W.2d 514 (Ky.1995), Kentucky adopted the U. S. Supreme Court's analysis of the 801A(a)(2) language and affirmed long-standing common law precedent that statements of the child to the physician can be exempted from the hearsay exclusionary rule only to the extent that a charge of fabrication or improper motive has been made. Put simply, the child's (or patient's) statements are irrelevant bolstering until they address the issues listed in KRE 801A(a)(2).
- e. If the child is incompetent to testify at trial, any statements made to treating physicians are not admissible. *BB v. Commonwealth*, 226 S.W.3d 47 (Ky.2008) overruling *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky.1986).

**Statements identifying perpetrator:**

- f. The identity of the perpetrator of sexual abuse is not relevant to medical treatment or diagnosis, for purposes of exception to hearsay rule for statements made for purposes of medical treatment or diagnosis, even where a family or household member is the perpetrator of sexual abuse against a minor of that household; overruling *Edwards v. Commonwealth*, 833 S.W.2d 842, *J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services*, 239 S.W.3d 116, and *Plotnick v. Commonwealth*, 2008 WL 162881. *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010) and *Alford v. Com.*, 338 S.W.3d 240, 247 (Ky. 2011)(admission of this type testimony was palpable error).
- g. In some cases, prosecutors claim that statements of the declarant contained in medical records can qualify for exemption because KRE 803(4) and 803 (6) meet the independent admissibility requirement of KRE 805. This is wrong. The doctor has a legal duty to note and report abuse under KRS 620.030(1) & (2). But the declarant has no business or legal duty to report the abuse. Thus, the report of activity prong of the analysis fails.
- h. However, if the declarant appears and testifies, if the KRE 613 foundation is laid, and if there is a legitimate purpose for the introduction of additional evidence of identification, the prior statement of identification is exempted by KRE 801A(a) (3).

**803(5): Recorded Recollection**

This exception deals with admitting into evidence that which refreshed the witness's recollection. These documents may be read into evidence, but only the adverse party may introduce them as exhibits. See *Hall v. Transit Authority*, 883 S.W.2d 884, 887 (Ky. App.1994). For a hearsay statement to be admissible as a recorded recollection, it must first be established that the witness has insufficient recollection to testify without the recording. *Barnett v. Commonwealth*, 317 S.W.3d 49, 59 (Ky. 2010).

**803(6): Records of Regularly Conducted Activity**

- a. The proponent of the evidence must show that the record was created as part of a "regularly conducted business activity" and that it was the "regular practice" of that business entity to make records of its activities. These two requirements exist to keep out records created for the purpose of influencing later litigation. The rule permits records in "any form" of acts, events, conditions, opinions or diagnoses made in the course of the business activity "at or near the time" of occurrence, or from information transmitted by a person with knowledge. The record maker need not have any personal knowledge about the information. *Welsh v. Galen of Virginia*, 128 S. W. 3d 41 (Ky. App.2001). Almost any regular activity can qualify as a business under the rule. For example, in *Kirk v. Commonwealth*, 6 S.W.3d 823, 828 (Ky.1999), a deceased medical examiner's autopsy report, including his opinions, was admissible. However, opinions and findings contained in the records are not admissible if the maker of the record would not be allowed to testify about the result if he/she were present to testify. In the case of physical evidence where authentication evidence is lacking, the fact that the results are stored in the business records does not make those results admissible. *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 9 (Ky.1998); *Fields v. Commonwealth*, 12 S.W.3d 275, 280, 284 (Ky.2000). Both the maker of the record and the person providing the information must have been acting under a business duty for the observation/statement to be admissible. *Thacker v. Commonwealth*, 115 S. W. 3d 834 (Ky.App.2003). If either the maker or the recorder is not under such a duty, the business record

## NOTES

is not admissible. The rule also requires, even if the recorder is under some duty to record the information, that it must be the organization's normal business to do so – it may not be some isolated decision to record that type of data. *Brooks v. LFCUCG*, 132 S.W. 3d 790 (Ky.2004). *But see Lukjan v. Commonwealth*, 358 S.W.3d 33 (Ky. App. 2012)( Lightning strike report was inadmissible as business record in arson prosecution, where certification supplied by records custodian was inadequate; certification represented that data was detected and recorded by sensors and processed by computer, in manner more typical of scientific, technical, or specialized information.)

- b. **Medical Records.** The rule makes a provision for hospital records that will still be obtained and presented to the court under KRS 422.300 *et. seq.* So long as the authentication requirements are met, medical records are normally admissible as business records under KRE 803(6). However, medical records may contain a second level of hearsay—for example, statements made by the victim who is being examined—that is not included in the business records exception. Such statements must be admitted under a different exception. *James v. Commonwealth*, 360 S.W.3d 189, 202 (Ky. 2012).

### **803(7): Absence of Entry in Business Record**

This rule deals with the absence of information that would usually be found in well-kept records of the particular business or other operation. The inference is that the absence of a specific entry indicates that an act was not done. To introduce evidence under the rule, the party must satisfy the foundation requirement set out in KRE 803(6), and must authenticate the records either through the testimony of the keeper of the records, or under KRE 902.

### **803(8): Public Records and Reports, and (9) Records of Vital Statistics**

- a. Public records are treated like business records, but they have their own rule numbers. This record exception is important because it allows the introduction of public records without cumbersome foundation requirements. However, it is important to note that under KRE 803(8) no one may introduce investigative reports by police or other law enforcement officers under this exception. They might be admissible under KRE 106 or KRE 612. But they may not be introduced under this rule. The government is prohibited from introducing its own investigative reports and fact-findings under this rule. These excluded matters may become relevant and therefore admissible due to an action of the adverse party, but they may not be introduced as a matter of course as an exception to the hearsay rule. *Skeans v. Commonwealth*, 912 S.W.2d 455 (Ky.1995); *Prater v. CHR*, 954 S.W.2d 954, 958 (Ky.1997); *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 776 (Ky.App.1998).
- b. Records from the Department of Corrections are public records. *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky.2005).

### **803(10): Absence of Entry in Public Record**

This provision fills the same purpose as KRE 803(7) has for business records. Where a record is expected to be found, but is not found, a party may introduce the statement of the keeper of the record that a diligent search has failed to disclose the record, report or statement. If such a statement is filed in accordance with the authentication provisions of KRE 902, the statement is substantive evidence of the non-existence of an item or the non-occurrence of an event.

### **803(18): Learned Treatise**

Known as the learned treatise rule, statements from such a document are not excluded by the hearsay rules, even though the declarant is not available as a witness, when these statements are used in questioning an expert witness, either on direct or cross, if the statements are established as a reliable authority either by the witness, other expert testimony, or by judicial notice. The judicial notice used in this rule goes only to whether the document is a reliable authority, not that the statements read are adjudicative facts. As always, the weight of the authority must be determined by the trier of fact. *Stokes v. Commonwealth*, 275 S.W.3d 185, 188 (Ky. 2008).

**803 (22)**

This rule is used to excuse calling the court clerk when evidence of a final judgment is relevant. The judgment must, of course, be authenticated under KRE 902 or some other rule or statute. *Pettway v. Commonwealth*, 860 S.W.2d 766 (Ky.1993); *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 777 (Ky. App.1998).

**KRE 804: Hearsay exceptions: declarant unavailable**

## NOTES

a. **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:

1. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
2. Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
3. Testifies to a lack of memory of the subject matter of the declarant's statement;
4. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5. Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

b. **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
2. Statement under belief of impending death. In a criminal prosecution or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.
3. Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
4. Statements of personal or family history.
  - A. A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or
  - B. A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
5. Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

## NOTES

**HISTORY:** Amended by Supreme Court Order 2004-1, eff. 7-1-04; 1992 c 324, § 23, 34, eff. 7-1-92; 1990 c 88, § 59.

**DISCUSSION:**

The focus of this inquiry is on the availability of declarant's testimony, not the declarant himself. The witness may be physically present but some reason either unable to testify or has changed the substance of his testimony. In these circumstances, 804 applies.

- a. KRE 804 (a) (1) recognizes lawful privileges as grounds for unavailability.
- b. KRE 804 (a) (2) recognizes that some witnesses will, because of corrupt motives or honest belief, refuse to testify. This subsection prevents an intransigent witness from defeating the policy of requiring evidence from every person.

The witness cannot refuse in advance. The refusal must follow an explicit order to testify.

- c. If the witness appears but "testifies" that she lacks "memory of the subject matter of the declarant's statement" the witness is unavailable under KRE 804 (a)(3).

This decision is one for the judge under KRE 104(a) The judge may disbelieve and refuse to find the witness unavailable.

- d. The death of the declarant, or serious physical or mental illness at the time testimony is desired, present obvious problems of unavailability. This is a preliminary question to which the rules do not apply. KRE 1101(d)(1). Although the judge may accept the attorney's representation as to death or illness, prudence dictates a more convincing showing through a death certificate or a letter from a physician.
- e. A party wishing to rely on Subsection(a)(5) should be able to show that a subpoena was timely issued and that good faith efforts to serve it failed. U.S. Supreme Court precedent says that this much is necessary to protect the defendant's right of confrontation. *Ohio v. Roberts*, 448 U.S. 56 (1980). The fact that the Commonwealth has attempted to subpoena a witness without success is insufficient for the defendant's attempt to show that the witness is unavailable: the defendant must make his or her own independent efforts to have the witness served. *Justice v. Commonwealth*, 987 S.W.2d 306, 313 (Ky.1999).
  - 1. RCr 7.02 requires personal service. A mailed subpoena, even if the witness agrees to it, is invalid. Thus, the witness cannot be considered properly summoned and cannot be considered unavailable.
  - 2. KRS 421.230-270 and KRS 421.600, et. seq., provide means of summoning out of state witnesses and prisoners. To summon a federal prisoner, the party should file a petition for a Writ of Habeas Corpus ad Testificandum in the federal district court. The existence of these remedies indicates that they are "reasonable" means to secure the presence of witnesses and therefore a party must at least attempt to use them to secure the presence of a witness. If the court denies relief after application, the party has done all she can to procure attendance.

**804 (b)(1): Former Testimony**

- a. **Declarant must have been under oath.** This exemption from the hearsay exclusionary rule involves, first, "testimony given as a witness." If the declarant was not under oath and testifying, the statements cannot be exempted. The statement must have been made by the declarant in a hearing or deposition given in the same or a different proceeding. The burden of establishing these conditions rests with the proponent of the evidence, *Brown v. Commonwealth*, 313 S.W.3d 577, 608 (Ky. 2010) and *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky.2004).
- b. If given in a deposition, the deposition must have been authorized under the grounds set out in RCr 7.10(1) or (2). RCr 7.20(1) lists the situations in which the deposition may be used, but because of its explicit reference to use "so far as otherwise admissible under the rules of evidence," it appears that the criminal rule has been superseded by KRE 804.
- c. **Opponent must have had opportunity and similar motive to develop testimony.** The exemption is not available unless the opponent had "opportunity and similar motive" to "develop" the testimony by direct, cross, or redirect examination. If the opportunity and motive for developing existed at the time the statement was made, and the opponent declined to do so, the statement qualifies for exemption. If the opponent had opportunity, but no reason, to "develop" the

testimony at the time it was given, (e.g., at a bond reduction hearing), the statement does not qualify. The key is opportunity to question the declarant at the time of the prior testimony as rigorously as she would be examined at the present hearing or trial. It does not matter if it was actually done. The only question is whether the opponent had a chance to do so.

- d. A key case on the use of former testimony at one trial during the defendant's re-trial is *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010). The Court found portions of the testimony were inadmissible hearsay. To wit: Video recording of defendant's testimony from his first trial during which prosecutor asked defendant to comment on other witness' testimony that defendant had brought television presumably taken from victim to her apartment, which evidence was not presented on retrial, was inadmissible hearsay, where Commonwealth made no attempt to show that witness was unavailable to testify. Video recording of capital murder defendant's testimony from his first trial during which prosecutor asked defendant questions about witnesses' testimony to effect that defendant had threatened them about same time that police seemed to be focusing their attention on defendant was inadmissible hearsay, where Commonwealth made no attempt to show that witnesses were unavailable to testify.

### **804 (b)(2): Statement Under Belief of Impending Death**

In *Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky.1995), the court held that statements made by the deceased to a 911 operator and to EMTs within minutes of the stabbing and later statements to a detective after being told his condition was critical and that he could die at any minute, qualified for exemption under this rule. The proponent must show that the declarant actually knew of the seriousness of his condition and that he believed that he might die. The belief in impending death is the circumstantial guarantee of trustworthiness in this instance. *Turner v. Commonwealth*, 5 S.W.3d 119 (Ky.1999), provides an excellent discussion of this exception.

### **804 (b)(3): Statement Against Interest**

- a. This is the most problematic of the exemptions because, in criminal cases, the use of such declarations often involves constitutional rights of the defendant. The use of statements to exculpate the defendant implicates the defendant's right to present exculpatory evidence. The use of such statements to inculcate the defendant can violate the constitutional right of confrontation.
- b. However, four considerations are relevant to the trustworthiness of statements under this exception: (1) the time of declaration and the party to whom made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against the declarant's penal interest; and (4) the availability of the declarant as a witness. The court must consider the totality of the circumstances, including not only the circumstances surrounding the making of the statement, but also other evidence at trial that corroborates the truth of the statement. *Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008).
- c. "Context is important in all situations involving [the KRE 804(b)(3) hearsay] exception but perhaps more crucial in the evaluation of statements against penal interests, *especially those made by declarants speaking to police authorities who have them in custody for criminal charges*" Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 8.45[6], p. 635 (4th ed.2003) (emphasis added); see also \*740 *Williamson v. United States*, 512 U.S. 594, 603, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) ("[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context"). *Walker v. Commonwealth*, 288 S.W.3d 729, 739-40 (Ky. 2009).
- d. **Codefendant statements.** In *Terry v. Commonwealth*, 153 S. W. 3d 794 (Ky.2005), the court noted that statements that qualify under this rule cannot be used against codefendants. See also *Walker v. Commonwealth*, 288 S.W.3d 729 (Ky. 2009)(Statement made to police by co-defendant, that co-defendant saw defendant carrying two handguns, was not admissible at murder trial under hearsay exception for statements against penal interest, since statement did not tend to subject him to criminal liability; statement occurred in context of interrogation in which co-defendant was attempting to blame defendant for murder.)
- e. It is insufficient the statement merely potentially subjects a declarant to criminal penalties, to wit: possible perjury charges are insufficient. *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky.2001).

## NOTES

**804 (b)(4): Personal or Family History**

These statements are exempted from the hearsay exclusionary rule because they literally might be the only source of information if the declarant does not testify.

**804(b)(5): Forfeiture by Wrongdoing**

- a. As noted in *Crawford v. Washington*, statements are admitted under this rule to penalize a party that procured the absence of the witness by improper means. It is a forfeiture rule, not a hearsay exception. The proponent of a statement under this rule must show that the adverse party (1) either engaged in, or acquiesced in someone else's, wrongdoing, (2) that the wrongdoing was intended to procure the witness's absence, and (3) that it actually was the cause of the witness's absence. This seemingly rigorous set of requirements is rendered less onerous by the fact that the decision is a preliminary one governed by *KRE 104(a)* to which the rules of evidence (save privileges) do not apply. *KRE 1101(d)(1)*. This should be applied only where the purpose of any wrongful act was to silence the witness. This does not mean every statement by a murdered victim comes in. Underwood and Weissenberger *Kentucky Evidence Courtroom Manual*, 2007-2008 edition, p. 514.
- b. The two seminal Kentucky cases addressing this issue are *Hammond v. Commonwealth*, 366 S.W.3d 425 (Ky. 2012) and *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009). Under *Parker*, the trial court should hold a separate hearing before trial to determine whether this exception applies so that the parties and the court can be fully cognizant of the evidence that likely will be presented to the jury. At that hearing, the proponent (the Commonwealth) of hearsay evidence sought to be admitted under forfeiture-by-wrongdoing exception to the confrontation clause must first introduce evidence establishing good reason to believe that the defendant intentionally procured the absence of the declarant, then the burden of going forward shifts to the party opposing introduction of the hearsay to offer credible evidence to the contrary. The proponent of the evidence need only prove by a preponderance of the evidence that the defendant engaged or acquiesced in wrongdoing that made the declarant unavailable. *Hammond v. Commonwealth*, 366 S.W.3d 425 (Ky. 2012) and *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009).
- c. Eyewitness's out-of-court statements to police investigators were not admissible in prosecution for murder and other offenses under the forfeiture by wrongdoing exception to hearsay rule, as Commonwealth's theory that defendant orchestrated eyewitness's murder to prevent her from testifying against him at trial was based exclusively on unauthenticated documents tendered by the Commonwealth, without any evidentiary foundation. *Hammond v. Commonwealth*, 366 S.W.3d 425 (Ky. 2012).

**KRE 805: Hearsay within hearsay**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 60

**DISCUSSION:**

Under the Rules, hearsay statements contained in other hearsay statements may be admitted. This Rule continues the Common Law precedent that multiple hearsay statements may be admitted if they individually qualify under an exception. *Terry v. Commonwealth*, 153 S.W. 3d 794, 798 (Ky.2005). This rule is another indication that hearsay exceptions apply to a single remark and that each remark must stand or fall on its own. *Thurman v. Commonwealth*, 975 S.W.2d 888, 893 (Ky.1998). An often used example for this Rule involves an excited utterance, *KRE 803(2)*, or statement for medical treatment, *KRE 803(4)*, contained in a medical record. *KRE 803(6)*. As in all hearsay cases, qualification for exemption from the Hearsay Exclusionary Rule does not guarantee admissibility. *KRE 402; 403*.

**KRE 806: Attacking and Supporting Credibility of Declarant**

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant

may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

**HISTORY:** 1992, c 324, § 34, eff. 7-1-92; 1990 c 88, § 61

**DISCUSSION:**

- a. When a hearsay statement has qualified under KRE 803 and 801A(b), the declarant often is not present. Under KRE 804 the declarant is never present to testify and be cross-examined as to credibility. This rule makes it clear that the adverse party may use the same methods to attack the credibility of the declarant as if he were present and available for cross examination.
- b. The second sentence of the Rule excuses the adverse party from the duty of establishing the KRE 613 foundation when the witness is not present.
- c. It is important to recall that KRE 801A(a) requires the witness to be present and questioned pursuant to KRE 613 before prior inconsistent, consistent, or identification statements can qualify. KRE 806 is unnecessary in these instances because the witness is available for questioning and for impeachment as to credibility.
- d. The party against whom a hearsay statement is admitted may call the declarant as a witness. KRE 806 allows that party to “examine the declarant...as if under cross-examination” but only as to the statement. Barring a showing of hostility, the party must avoid leading questions on other subjects. KRE 611(c).
- e. There may be a notice problem in this Rule. The party against whom the statement is introduced may not know that the declarant will not be called until trial is underway. A prudent attorney will ask the prosecutor about his intentions or will simply “stand by” subpoena the witness.
- f. If a party attacks the credibility of a declarant under this rule, the adverse party may use the same techniques of rehabilitation or support as if the declarant were present and testifying.

**Crawford Considerations:**

- g. In *Crawford v. Washington*, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held the 6th Amendment confrontation clause prohibits admission of an out of court “testimonial” statement at a criminal trial except (1) where the declarant appears as a witness and can be cross examined about the statement or (2) where the declarant does not appear as a witness but the adverse party had an opportunity to cross examine the declarant at an earlier proceeding. §11 of the Kentucky Constitution also embodies the right to confrontation.
- h. *Crawford* rejects the *Ohio v. Roberts*, 448 U. S. 56 (1980); reliability test for testimonial statements. *Crawford* does not give a comprehensive definition of a “testimonial” statement. “[I]n-court testimony or its functional equivalent – that is material such as affidavits, custodial examinations, prior testimony ..., or similar pretrial statements that declarants would reasonably expect to be used prosecutorially” are testimonial statements. *Crawford* at 1364. “Extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” are also testimonial. *Crawford* at 1374.
- i. Non-testimonial statements include business records, co-conspirator statements. *Crawford* at 56. In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74, 165 LEd.2d 224 (2006), the U.S. Supreme Court held “[s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” If the statements are non-testimonial there isn’t a confrontation issue.
- j. In published decisions, Kentucky courts have discussed *Crawford* implications in:
  1. *Steward v. Commonwealth*, 2011-SC-000393, 2012 WL 6634913, --- S.W.3d --- (Ky. 2012) (not final)
  2. *Massie v. Commonwealth*, 2010-CA-001861, --- S.W.3d --- (Ky. App. 2012) (unpublished)

## NOTES

## NOTES

3. *Hammond v. Commonwealth*, 366 S.W.3d 425 (Ky. 2012)(*Crawford* and forfeiture by wrongdoing)
4. *James v. Commonwealth*, 360 S.W.3d 189 (Ky. 2012)
5. *Whittle v. Commonwealth*, 352 S.W.3d 898 (Ky. 2011)
6. *Peters v. Commonwealth*, 345 S.W.3d 838 (Ky. 2011)(*Crawford* and lab report)
7. *Grady v. Commonwealth*, 325 S.W.3d 333 (Ky. 2010)
8. *Commonwealth v. Stone*, 291 S.W.3d 696 (Ky. 2009)(*Crawford* and co-defendant statements)
9. *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009)(*Crawford* and co-defendant statements)
10. *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009)(*Crawford* and forfeiture by wrongdoing)
11. *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009)
12. *Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008)
13. *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky. 2007)
14. *Baker v. Commonwealth*, 234 S.W.3d 389 (Ky. 2007)
15. *Commonwealth v. Walther*, 189 S.W.3d 570 (Ky. 2006)
16. *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006)
17. *Terry v. Commonwealth*, 153 S.W.3d 784 (Ky. 2005)
18. *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2004)



## Article IX. Authentication and Identification

## NOTES

### **KRE 901: Requirement of Authentication or Identification**

- a. General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
- b. Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
  1. Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
  2. Non-expert testimony on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for the purposes of litigation
  3. Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
  4. Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
  5. Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
  6. Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular place or business if:
    - A. In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or
    - B. In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.
  7. Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
  8. Ancient documents or data compilation. Evidence that a document or data compilation, in any form:
    - A. Is in such condition as to create no suspicion concerning its authenticity;
    - B. Was in a place where it, if authentic, would likely be; and
    - C. Has been in existence twenty (20) years or more at the time it is offered.
  9. Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
  10. Methods provided by statute or rule. Any method of authentication or identification provided by act of the General Assembly or by rule prescribed by the Supreme Court of Kentucky.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 62

#### **DISCUSSION:**

- a. Article IX requires the party offering tangible evidence to show that the object is what the party claims it is. The trial court determines relevance questions under Article IV. If the object is a writing containing statements, it must also satisfy one of the hearsay exceptions under Article VIII. This Article provides a way to avoid calling witnesses for the sake of identifying objects about whose authenticity there is little doubt. The burden on the proponent of authentication is slight; only a prima facie showing of authenticity is required. *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky.2004).
- b. The Commentary says that authentication and identification under this rule is a matter of conditional relevancy to be determined under KRE 104(b). *Johnson v. Commonwealth*, 134 S. W.

## NOTES

3d 563 (Ky.2004). In these circumstances, the judge makes a determination that the proponent of the evidence has introduced enough evidence to allow a reasonable jury to conclude that the object is what it is claimed to be.

**901 (a)**

- a. States the basic principle of authentication. This rule applies to any tangible objects that may be introduced, murder weapons, drugs, blood stained clothes and any other objects. The only thing necessary to support admission into evidence is production by the Commonwealth of evidence that would allow the jury, if it wants to, to decide that the pistol introduced is the one that was taken from the scene or that the dope presented in court is the dope that was taken from the defendant's pocket. *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky.1998). *But see Gerlaugh v. Commonwealth*, 156 S.W.3d 747 (Ky.2005) (the Commonwealth failed to provide evidence that the gun found in defendant's car nine days after the robbery was the pistol used in the robbery).
- b. *Hunt v. Commonwealth*, 304 S.W.3d 15 (Ky. 2009)(defendant failed to properly authenticate a telephone bill. Defendant should have called custodian of the bill or other qualified witness).
- c. Generally, there is no strict chain of custody rule. In *Rabovsky*, the court noted that a chain is not necessary to qualify guns or other easily identified items for admission.
- d. Exception: A chain is required for blood, human tissue samples, drugs or similar items. Chain need not be perfect. *Muncy v. Commonwealth*, 132 S.W. 3d 845 (Ky. 2004); *Parson v. Commonwealth*, 144 S.W. 3d 775 (Ky.2004). The proponent must show that it is reasonably probable that the evidence has not been altered and that the substance tested was the substance seized or taken. Foundation is sufficient if evidence demonstrates a reasonable assurance that the condition of the item remains the same form at the time it was obtained until its introduction at trial. *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky.2006) *overruled on other grounds* *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010).
- e. Chain of custody defects go to the weight of the evidence, not its admissibility. *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky.2006) *overruled on other grounds* *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010).
- f. To authenticate a photo, a party must introduce evidence, through testimony primarily, that it accurately depicts the subject of the photograph. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 11.05[2] (4th ed.2003).
- g. A replica may be introduced upon a showing that it is similar to the original object. *Allen v. Commonwealth*, 901 S.W.2d 881, 884 (Ky.App. 1995), contains a foundation colloquy for replicas. (Does this look like the original? Is there any difference in this and the original? Is it about the same as the original?)

**901(b)**

- a. **Provides examples of ways in which to authenticate items.** The methods listed here are exclusive. *Soto v. Commonwealth*, 139 S.W. 3d 827 (Ky. 2004). Any witness with knowledge that the matter is what it is claimed to be may testify and this may satisfy the foundation burden.
- b. **Documents allegedly written by defendant.** *See also Contents of Letter. S.D.O. v. Commonwealth*, 255 S.W.3d 517 (Ky. 2008)(“Hit list” written by defendant properly authenticated.); *Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007)(Notebooks found in defendant's home which were alleged to be “drug ledgers” were properly authenticated.)
- c. **Handwriting.** Any lay person familiar with the handwriting of another, as long as that person knew the handwriting before the litigation began, may testify concerning “the genuineness” of handwriting. An expert witness may also do so. *Soto v. Commonwealth*, 139 S. W. 3d 827 (Ky.2004).
- d. **Contents of letter** may be proved by identification of information in the letter uniquely within the knowledge of the writer. *Johnson v. Commonwealth*, 134 S.W. 3d 563 (Ky.2004) *See also Ordway v. Commonwealth*, 352 S.W.3d 584, 594 (Ky. 2011)(letter alleged to have been written by the defendant while in jail awaiting trial on pending charges was properly authenticated based the “quantity of identifying facts” contained in the letter.); *Sanders v. Commonwealth*, 301 S.W.3d 497 (Ky. 2010)(Note purportedly written by defendant to state's witness was adequately authenticated and thus was admissible in prosecution for first-degree robbery; witness testified that prison guard gave her letter and stated that it was written by defendant, letter included

## NOTES

references to charges facing defendant and instructions to call defendant's brother, and when witness called defendant's brother, brother gave witness information relating to her testimony at trial.)

- e. **Voice Identification.** Any person who testifies that she knows a voice may identify it. *See Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009), attorney allowed to identify voice on tape as former client's.
- f. **Telephone conversation.** A party may prove the identity of the person on the other end by showing that the call was made to the assigned number and that the circumstances, which may include the other person identifying himself, show that the person answering was the one called. In case of a business, if the call was made to the correct number and the conversation related to business usually conducted over the phone, the foundation burden is met. *Soto v. Commonwealth*, 139 S.W. 3d 827 (Ky.2004).
- g. **Constitutional consideration.** Court can compel a handwriting or voice specimen of a defendant without violating the defendant's Fifth or Sixth Amendment rights. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).
- h. **Public Record.** Any public records that are recorded or filed as allowed by law in a public office or a public record of any sort kept in a public office may be identified simply from that fact.
- i. **Ancient Documents.** As long as there is no reason to suspect anything untoward, may be admitted if they are 20 years or more old at the time offered.
- j. **Process or System.** The process illustration deals with situations like photographs taken by automatic cameras in banks. The party must introduce sufficient evidence to show the design of the system, that it was working, and that it is reasonable to expect that the photographs taken were the result of this system working properly.
- k. **Breathalyzer Results.** In DUI cases, the foundation for introduction of breathalyzer results can be established solely by testimony as long as the service record of the machine and the test paper are also admissible. The service technician need not appear. *Commonwealth v. Roberts*, 122 S.W. 3d 524 (Ky.2003).
- l. **Catchall.** A catchall authorizes proof by any other method authorized by law. An example is KRS 422.300 which is a procedure for authenticating medical records without calling the records librarian. *Bell v. Commonwealth*, 875 S.W.2d 882, 887 (Ky.1994). *See Bennington v. Commonwealth*, 348 S.W.3d 613 (Ky. 2011)(Hospital records that defendant sought to use to impeach victim's testimony that her mother had checked into hospital after victim, when she was a minor, reported to her mother that defendant was sexually abusing her were not properly authenticated, and, thus, the records were inadmissible, in prosecution for rape, sodomy, and incest, as defendant failed to call a custodian of the records as a witness to authenticate the records.)

#### KRE 902: Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

1. **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
2. **Domestic public documents not under seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
3. **Foreign public documents.** A document purporting to be executed, or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature or official position:

## NOTES

- A. Of the executing or attesting person; or
- B. Of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation.

A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

4. **Official records.** An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by an official having the legal custody of the record. If the office in which the record is kept is outside the Commonwealth of Kentucky, the attested copy shall be accompanied by a certificate that the official attesting to the accuracy of the copy has the authority to do so. The certificate accompanying domestic records (those from offices within the territorial jurisdiction of the United States) may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of office. The certificate accompanying foreign records (those from offices outside the territorial jurisdiction of the United States) may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office. A written statement prepared by an official having the custody of a record that after diligent search no record or entry of a specified tenor is found to exist in the records of the office, complying with the requirements set out above, is admissible as evidence that the records of the office contain no such record of entry.
5. **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.
6. **Books, newspapers, and periodicals.** Printed materials purporting to be books, newspapers, or periodicals.
7. **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
8. **Acknowledged documents.** Documents accompanied by a certificate of acknowledgement executed in the manner provided by law before a notary public or other officer authorized by law to take acknowledgements.
9. **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by the general commercial law.
10. **Documents which self-authenticate** by the provisions of statutes or other rules of evidence. Any signature, document, or other matter which is declared to be presumptively genuine by Act of Congress or the General Assembly of Kentucky or by rule of the Supreme Court of Kentucky.
11. **Business records.**
  - A. Unless the sources of information or other circumstances indicate lack of trustworthiness, the original or a duplicate of a record of regularly conducted activity within the scope of KRE 803(6) or KRE 803(7), which the custodian thereof certifies:
    - i. Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
    - ii. Is kept in the course of the regularly conducted activity; and
    - iii. Was made by the regularly conducted activity as a regular practice.

## NOTES

- B. A record so certified is not self-authenticating under this paragraph unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.
- C. As used in this paragraph, “certifies” means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury, and, with respect to a foreign record, a written declaration which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position:
  - i. Of the individual executing the certificate; or
  - ii. Of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual.

A final certification must be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by an officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office.

**HISTORY:** 1992 c 324, § 24, 34, eff. 7-1-92; 1990 c 88, § 63

**DISCUSSION:**

- a. This rule allows a party to introduce certain documents without bringing a witness to the hearing to identify them. This type of self-authentication is premised on a belief that there is no good reason to require production of another witness where items have already been identified by satisfactory means outside of court. The most important parts for purposes of criminal practice deal with public documents which may be introduced under KRE 902(1) or (2) upon seal and attestation of the keeper of the document. *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005)
- b. Subsection (4) illustrates the means by which a party may introduce official records or show that no such record is found. The keeper of the official records may issue a certificate attesting to the accuracy of the copy of the record (which is allowed as a matter of course under KRE 1005). *Munn v. Commonwealth*, 889 S.W.2d 49, 51 (Ky.App.1994). When this is done, the record is deemed “self-authenticating.” *Soto v. Commonwealth*, 139 S. W. 3d 827 (Ky.2004).
- c. The last important self-authentication provision is KRE 902(11) which is designed to facilitate the production of business records of the type admissible under KRE 803(6) or 803(7) upon certification by the custodian that the record was made at or near the time of occurrence of the matters involved, either by or from information transmitted by a person with knowledge of the event, is a record kept in the course of a regularly conducted activity, and was made as a regular practice. *Commonwealth v. Roberts*, 122 S. W. 3d 524 (Ky.2003); *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 9 (Ky.1998); *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky.1999). In short, the custodian of business records need not be produced at trial if the record is certified. *Merriweather v. Commonwealth*, 99 S.W. 3d 448 (Ky.2003) and *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010). However, there is a notice requirement which requires the proponent to let the adverse party know that the record is coming in and to produce the record at such time before introduction that the adverse party has a “fair opportunity” to challenge it. For straight business records, the certification must be a “written declaration under oath subject to the penalty of perjury.”
- d. Although KRE 902(11) can be used to admit hospital records, better practice might be to follow the procedure under KRS 422.300 to 422.330 which will guarantee the subject of the medical records at least some measure of privacy before trial.
- e. In *Skeans v. Commonwealth*, 912 S.W.2d 455, 456 (Ky.App.1995), the court held that certified copies of a driver’s record could be used to prove the date of a prior offense in DUI cases.
- f. Establishing authenticity does not mean the document is admissible. *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky.2005)

## NOTES

- g. 902(11)(a) *Lukjan v. Commonwealth*, 358 S.W.3d 33 (Ky. 2012) (Lightning strike report was inadmissible as business record in arson prosecution, where certification supplied by records custodian was inadequate; certification represented that data was detected and recorded by sensors and processed by computer, in manner more typical of scientific, technical, or specialized information.)
- h. *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010), Kentucky probation and parole officer can testify to the contents of properly certified Indiana prior convictions. Commonwealth is not required to have an Indiana custodian testify.

**KRE 903: Subscribing Witness' Testimony Unnecessary**

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 64

**DISCUSSION:**

This rule does away with the common law requirement that the subscribing witness must appear and testify. The Commentary notes that in will cases, the witnesses to the will must appear and testify unless the will is self-authenticating under Chapter 394 of the statutes.

## Article X. Contents of Writings, Recordings, and Photographs

## NOTES

### **KRE: 1001: Definitions**

For purposes of this article the following definitions are applicable:

1. Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
2. Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
3. Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
4. Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 65

#### **DISCUSSION:**

- a. Professor Lawson has made the point a number of times that the best evidence rule was important at a time when copies were made by hand or by other methods that could result in errors affecting the intent and meaning of the written document. He says that now, where there are so many different ways of producing accurate copies, the rule is one of "preference" rather than one of necessity. (Commentary, p. 108-109). See *Savage v. Three Rivers Medical Center*, 390 S.W.3d 104 (Ky. 2012)(party is required to proffer the best evidence they have - the most authentic evidence which is in their power to present.)
- b. KRE 1001 is the definition section for Article X and it describes the types of objects to which the "best evidence rule" is applicable. First the rule applies to writings or recordings which means that if it is written down on a paper, put on a magnetic tape, put on a disk, or is on a tape recording or compact disc, it is a writing or recording for purposes of the rule. Photographs, including normal photographs, x-rays, videotapes and motion pictures, also are included.
- c. The definitions of the terms "original" and "duplicate" are important because they describe what may be introduced as more or less the original without worrying about the best evidence rule. The original of a writing or recording is the first writing or recording itself, or any counterpart (*i.e.*, carbon copy or any hard copy made from the contents of a word processor system). An original of a photograph includes the negative or any print made from that negative. A duplicate is a "counterpart" produced by the same impression as the original or by means of photography including enlargement or miniaturization, or by mechanical or electronic re-recording or other equivalent technique. A duplicate is something that "accurately reproduces the original."

### **KRE 1002: Requirement of Original**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 66

#### **DISCUSSION:**

## NOTES

- a. The best explanation of this rule is found in the Commentary. “The best evidence rule is applicable only when the offering party is trying to prove the contents of a writing, recording, or photograph. If such an item is being used at trial for some other purpose, the provisions of this Article have no application.” (Commentary, p. 109) The Commentary also notes that, where photographs are simply used to illustrate a witness’s testimony, they are not being used to prove their contents, and therefore the best evidence rule does not apply. (Commentary, p. 109-110) However, where photographs are used to show, for example, the scene of an offense, or to show the location of an object within a room, they are being used to show the truth of some proposition(s) and therefore the rule must apply.
- b. The rule requires a party to introduce the most authentic evidence which is within their power to produce. *Johnson v. Commonwealth*, 231 S.W.3d 800, 805 (Ky.App.2007).

**KRE 1003: Admissibility of Duplicates**

A duplicate is admissible to the same extent as an original unless:

1. A genuine question is raised as to the authenticity of the original; or
2. In the circumstances it would be unfair to admit the duplicate in lieu of the original.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 67.

**DISCUSSION:**

Because there is little possibility of error where most duplicates are concerned, there is really not much reason to keep them out except when there is a genuine question raised concerning the authenticity of the original or when under the circumstances it would be unfair to admit the duplicate. The reason for the first exception is obvious, but the text writers do not provide much in the way of examples of any “unfairness.” Apparently the chief reason for this rule is that sometimes the duplicate may not contain the entire writing and therefore under KRE 106 the original containing all parts might be required.

**KRE 1004: Admissibility of Other Evidence of Contents**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

1. Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
2. Original not obtainable. No original can be obtained by any available judicial process or procedure; or
3. Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing.

**HISTORY:** 1990 c 324, § 34, eff. 7-1-92; 1990 c 88, § 68

**DISCUSSION:**

- a. This rule lists the instances in which the original is not required and in which other evidence concerning the writing, recording or photograph may be presented. Obviously, if the original is lost or destroyed other evidence of the contents must be provided. However, the proponent should be ready to show that they were lost or destroyed for reasons other than his own bad faith. The subpoena power of Kentucky ends at its borders. RCr 5.06; RCr 7.02(5). Sometimes documents can be obtained under the *Uniform Act to Secure the Attendance of Witnesses*. KRS 421.230 -270.
- b. Subsection (2) excuses the absence of the original only if the original cannot be obtained by “any” procedure. It seems that a party would have to at least try the statutory procedure to meet this requirement. If there is no way to obtain the original by judicial process then necessity requires introduction of other evidence. Finally, if the adverse party has the original and will not give it up, it is only fair to allow the proponent to introduce other evidence about the contents of the writing, recording or photograph. If the writing, recording or photograph bears only on some collateral



issue, the judge should be given some latitude in deciding whether the original is really necessary to make this point.

## NOTES

**KRE 1005: Public Records**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed with a governmental agency, either federal, state, county, or municipal, in a place where official records or documents are ordinarily filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with KRE 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 69

**DISCUSSION:**

This is a practical rule which recognizes that official records and documents ordinarily will not be available because they cannot be removed from their official depository. This rule does away with the requirement of an original and authorizes the use of copies certified under KRE 902 or copies attested as correct by witnesses who have made comparison of the documents. Although the Commentary says that there should be no preference of the alternatives, it seems obvious that there is a good deal less chance for error in a photocopy made under KRE 902 and this should be normal practice for most attorneys. *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 776 (Ky.App.1998). The comparison spoken of in this rule must be made by and testified to by an “appropriate” official of the agency possessing the records. *Munn v. Commonwealth*, 889 S.W. 2d 49 (Ky. App.1994).

**KRE 1006: Summaries**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. A party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the court. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 70

**DISCUSSION:**

This rule exists to avoid burying the court and the jury with more information than either can handle. This rule allows a party to present a chart, a written summary, or a set of calculations to present the information to the jury in a comprehensible form. Convenience, not necessity, is the standard. Of course a proper foundation must be laid establishing the correctness of the exhibit itself. The party intending to use a summary must give “timely” written notice to the opposing party and shall file this notice with the court as proof of having done so. All information relied upon must be made available for examination or copying or both by other parties. In certain circumstances, the judge may order that the supporting information be produced in court so that the basis of the summary can be verified. This means that the originals of the summarized material must be made available to the adverse party. An exhibit prepared under this rule cannot be admitted if any of the originals on which it is based are inadmissible unless they are admissible under KRE 703 as information used by experts. It is not necessary to produce everyone who worked on the chart or summary, but someone with sufficient knowledge should be produced at trial or hearing.

**KRE 1007: Testimony or Written Admission of Party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the non-production of the original.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 71

**DISCUSSION:**

- a. Obviously, a party who admits the authenticity of the contents of a writing, recording or photograph is not in a position to claim that there is a “genuine question” concerning the authenticity of the original. KRE 1003. Therefore, KRE 1007 authorizes introduction of any

## NOTES

evidence of the contents of a writing, recording or photograph if the party against whom it is offered admits genuineness.

- b. See for example, *Johnson v. Commonwealth*, 231 S.W.3d 800 (Ky. App.2007), (the defendant admitted during her testimony her husband's recitation of the terms of her husband's power of attorney did not require the Commonwealth produce the original power of attorney document).

**KRE 1008: Functions of Court and Jury**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of KRE 104. However, when an issue is raised:

1. Whether the asserted writing ever existed;
2. Whether another writing, recording, or photograph produced at the trial is the original;
3. Whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 72

**DISCUSSION:**

This rule sets out a special description of judge and jury duties. Ordinarily, the question of admissibility is for the judge under KRE 104(a). This involves questions arising under KRE 1004, 1001(4) and 1003. Ordinary questions of conditional relevancy must be left to the jury under KRE 104(b). The judge's duty is simply to make a determination that the proponent has introduced enough evidence that the jury reasonably could conclude that one of the exception rules is met.

## Article XI. Miscellaneous Rules

## NOTES

### **KRE 1101: Applicability of Rules**

- a. Courts. These rules apply to all the courts of this Commonwealth in the actions, cases, and proceedings and to the extent hereinafter set forth.
- b. Proceedings generally. These rules apply generally to civil actions and proceedings and to criminal cases and proceedings, except as provided in subdivision (d) of this rule.
- c. Rules on privileges. The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.
- d. Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:
  1. Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under KRE 104.
  2. Grand jury. Proceedings before grand juries.
  3. Small claims. Proceedings before the small claims division of the District Courts.
  4. Summary contempt proceedings. Contempt proceedings in which the judge is authorized to act summarily.
  5. Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing by a judge; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

**HISTORY:** 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 73

#### **DISCUSSION:**

- a. This rule must be read together with KRE 101. This rule emphasizes that these rules apply to the Court of Justice. As such, they do not apply to parole revocation hearings, administrative hearings, or any other type of executive branch proceeding unless those agencies enact regulations to adopt them. KRE 1101(c) makes it clear that privileges apply at all stages of “all actions, cases and proceedings” conducted in the Court of Justice. The important part of the rule for criminal defense lawyers is subsection (d) which lists the instances in which the rules do not apply.
- b. Under KRE 104, the rules do not apply when the judge is making a preliminary determination of the admissibility of evidence. This includes suppression hearings under RCr 9.78. *Kotila v. Commonwealth*, 114 S.W. 3d 226 (Ky.2003).
- c. Grand juries are not bound by the rules because of the nature of the proceeding. The requirement that the grand jury consider only “lawful” evidence was done away with when the Rules of Criminal Procedure were adopted in 1963. The grand jury may ask the judge or the prosecutor for advice on evidence questions, RCr 9.58; RCr 5.14(1), but there is no requirement that the grand jury follow the Rules of Evidence.
- d. In summary contempt proceedings, for acts or omissions in the presence of the judge, the rules do not apply. The judge is both witness and factfinder. Other criminal contempt proceedings, for acts or omissions outside the presence of the judge, are not mentioned here, and therefore are subject to the rules. Privileges apply in both kinds of contempt proceedings.
- e. Subsection (5) provides a list of the criminal proceedings at which the rules except for privileges do not apply.
  1. Extradition or rendition on governor’s warrants are not covered,
  2. The only stated purpose of preliminary hearings under RCr 3.14(1) is to determine whether there is probable cause to bind a person over for further proceedings. The Criminal Rule has long authorized use of hearsay testimony and the Evidence Rules make a provision for this. *White v. Commonwealth*, 132 S.W. 3d 877 (Ky. App.2003). In *Barth v. Commonwealth*, 80 S.W. 3d 390 (Ky.2001), the Court held that because KRS 640.010 mandates application of the Rules of Criminal Procedure to transfer hearings, otherwise inadmissible hearsay might be used to support the decision to transfer. The alternate ground, that KRS 1101(d) exempts

## NOTES

such hearings from the Rules, is plainly wrong. A transfer hearing under the Unified Juvenile Code is not a “criminal case.” It is a special statutory proceeding.

3. While it is true judge sentencing does not involve all due process requirements guaranteed for trial, it is important to keep in mind that a judge may not impose a sentence on material misinformation. *U.S. v. Tucker*, 404 U.S. 443 (1972). Unreliable evidence must be excluded regardless of the provisions of KRE 1101(d)(5). However, *Douglas v. Commonwealth*, 83 S.W. 3d 462 (Ky.2002), holds that a judge need not conduct a *Daubert* hearing before imposing a sex offender assessment rating.
4. Although there are no cases specifically saying so, reliable evidence is required in proceedings to grant, deny or revoke probation because they are elements of judge sentencing.
5. *Carrier v. Commonwealth*, 142 S.W. 3d 670 (Ky. 2004), holds that the rules do not apply in proceedings to obtain a search warrant.
6. The liberty of an arrested person should not be taken away without application of all safeguards necessary to an accurate determination of the facts. As the rule is written now, bail can be denied or revoked based solely on the statements of an officer reading from a case file. Section 1(1) of the Constitution proclaims individual liberty as the first (and therefore most important) right. Section 16 creates a presumption in favor of release on bail in almost all criminal cases. The liberty interest of the defendant, who is clothed with the presumption of innocence at this point, demands that the bail determination be made with a high degree of reliability. Judges should require the presence of witnesses with personal knowledge subject to cross-examination at all bail hearings. A bail ruling based on hearsay almost always will violate Sections 1(1) and 2 of the Constitution.

**KRE 1102: Amendments**

- a. **Supreme Court.** The Supreme Court of Kentucky shall have the power to prescribe amendments or additions to the Kentucky Rules of Evidence. Amendments or additions shall not take effect until they have been reported to the Kentucky General Assembly by the Chief Justice of the Supreme Court at or after the beginning of a regular session of the General Assembly but not later than the first day of March, and until the adjournment of that regular session of the General Assembly; but if the General Assembly within that time shall by resolution disapprove any amendment or addition so reported it shall not take effect. The effective date of any amendment or addition so reported may be deferred by the General Assembly to a later date or until approved by the General Assembly. However, the General Assembly may not disapprove any amendment or addition or defer the effective date of any amendment or addition that constitutes rules of practice and procedure under Section 116 of the Kentucky Constitution.
- b. **General Assembly.** The General Assembly may amend any proposal reported by the Supreme Court pursuant to subdivision (a) of this rule and may adopt amendments or additions to the Kentucky Rules of Evidence not reported to the General Assembly by the Supreme Court. However, the General Assembly may not amend any proposals reported by the Supreme Court and may not adopt amendments or additions to the Kentucky Rules of Evidence that constitute rules of practice and procedure under Section 116 of the Constitution of Kentucky.
- c. **Review of proposals for change.** Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of proposed amendments or additions from the Evidence Rules Review Commission described in KRE 1103.

**HISTORY:** 1992 c 324, § 26, 34, eff. 7-1-92; 1990 c 88, § 74

**DISCUSSION:**

- a. Both the Supreme Court and the General Assembly may propose rule changes. The rules of evidence, with the exception of privileges, are primarily issues of practice and procedure and therefore are assigned to the Supreme Court of Kentucky under Section 116 of the Constitution. *Manns v. Commonwealth*, 80 S. W. 3d 439 (Ky.2002). However, neither the court nor the General Assembly has power to amend or create rules unilaterally. *Weaver v. Commonwealth*, 955 S.W. 2d 922 (Ky.1999). Inferior courts have no authority to amend or create rules. Any proposed changes should be presented to the Evidence Rules Commission authorized by KRE 1103.

- b. Not all changes in evidence law come about by rule modification. In *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky.1997), the Supreme Court did away with the “ultimate issue” prohibition in expert testimony cases, a principle which was not covered by any specific rule. The court reasoned that evidence principles not preempted by enactment of rules remain within the court’s authority to change by case precedent as long as the court does so with due regard to rules of evidence in existence. The most recent controversy in this area deals with “habit evidence.” *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663 (Ky. App.2004).
- c. In *Stidham v. Clark*, 74 S.W. 3d 719 (Ky.2002), the Court observed that the sole means of creating privileges in Kentucky is by the rules amendment process.

### **KRE 1103: Evidence Rules Review Commission**

- a. The Chief Justice of the Supreme Court or a designated justice shall serve as chairman of a permanent Evidence Rules Review Commission which shall consist of the Chief Justice or a designated justice, one (1) additional member of the judiciary appointed by the Chief Justice, the chairman of the Senate Judiciary Committee, the chairman of the House Judiciary Committee, a member of the Board of Governors of the Kentucky Bar Association appointed by the President of the Kentucky Bar Association, and five (5) additional members of the Kentucky bar appointed to four (4) year terms by the Chief Justice.
- b. The Evidence Rules Review Commission shall meet at the call of the Chief Justice or a designated justice for the purpose of reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102. The Commission shall act promptly to assist the Supreme Court or General Assembly and shall perform its review function in furtherance of the ideals and objectives described in KRE 102.

**HISTORY:** Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 27, 34, eff. 7-1-92; 1990 c 88, § 75

#### **DISCUSSION:**

The Evidence Rules Commission is the initial screening body that will review any proposals to change the Kentucky Rules of Evidence.

### **KRE 1104: Use of Official Commentary**

The commentary accompanying the Kentucky Rules of Evidence may be used as an aid in construing the provisions of the Rules, but shall not be binding upon the Court of Justice.

**HISTORY:** 1992 c 324, § 28, 34, eff. 7-1-92; 1990 c 88, § 76

#### **DISCUSSION:**

The general rule in Kentucky is that a Commentary is not binding unless the adopting entity expressly says that it is. Although it does not have the force of law, the Commentary is perhaps the best evidence of what Lawson and the other drafters intended the rules to mean. *Commonwealth v. Maricle*, 10 S.W. 3d 117 (Ky.1999). It is occasionally cited in opinions. *St. Clair v. Commonwealth*, 140 S.W. 3d 510 (Ky.2004). Where rules have been amended or added to, *e.g.*, KRE 608, KRE 804(b)(5), any earlier Commentary must be disregarded.



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